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APPENDIX

SUPREME COURT of the UNITED STATES

October Term, 1970

No. 1349

70-112

JAMES E. GROPP, PETITIONER,

vs.

JACK LESLIE,
SHERIFF OF DANE COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

Petition for Certiorari Filed April 6, 1971
Certiorari Granted June 7, 1971

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

U. S. Form No. 106A Rev.

No. 69-C-241 (M) (H-C)

TITLE OF CASE	ATTORNEYS
JAMES E. GROPP, Jr., Petitioner,	<p>For Plaintiff</p> <p>*William M. Coffey and James M. Shellow, Shellow, Shellow & Coffey, 660 E. Mason St., (152 W. Wis. Ave.) 53203 Milwaukee, Wis. 53202 (Robert Frieber)</p> <p>and</p> <p>Percy L. Julian, Jr., 330 E. Willson St., Madison, Wis. 53701.</p>
-vs-	<p>*William M. Coffey, 152 West Wisconsin Ave., Milwaukee 53203 James M. Shellow, 660 E. Mason St., Milwaukee</p>

Respondent.

James Boll, D. A. of Dane County
City-County Building
Madison, Wisconsin 53709
Robert W. Warren,
Attorney General,
State Capitol,
Madison, Wis. 53702

APR 8 1970

Petition for writ of habeas corpus.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed.	Clerk	10/7/69	Sheltonwhite	5 00	5 00
		10/10/69	C.D.# 15		
S. 6 mailed	Marshal	5/15/70	State of (Winn)	5 00	
		5/15/70	C.D.# 45		5 00
asis of Action:	Docket fee				
leged illegal and unconsti-	Witness fees				
tional detention and incar-	Depositions				
ration of petitioner.					
Action arose at:					
Madison, Wisconsin.					

DATE	PROCEEDINGS	Date Order Judgment No.
10/7/69	Filed petitioner's Petition for Writ of Habeas Corpus	(1)
10/8/69	Filed order requiring respondent to file response to writ within 3 days of service of this order. U.S. Marshal's return thereon	(2)
10/8/69	Filed order to show cause returnable 10/10/69 at 11:00 a.m. U.S. Marshal's return thereon	(3)
10/8/69	Filed return of service of petition for writ of habeas corpus with the U.S. Marshal's return thereon. Attached it to petition	(4)
10/9/69	Filed order changing the time for hearing scheduled for 10/10/69 at 11:00 a.m. to 10/10/69 at 3:00 p.m.	(5)
10/10/69	Filed order to show cause returnable October 10, 1969, at 3:00, with service acknowledged thereon	(6)
10/10/69	Filed respondent's memorandum of authorities. (Delivered to Judge Doyle.)	(7)
10/10/69	Called for hearing on return of orders to show cause. Appearances: Shellow, Shellow & Coffey, by James M. Shellow, Gilda M. Shellow and Robert H. Frieibert; and Percy L. Julian, Jr., attorneys for plaintiff. Robert W. Warren, Atty. Gen; David Hanson, Betty Brown and Sverre O. Tinglum, Asst. Attys. Gen., attorneys for	

respondent. Offer of evidence on behalf of petitioner: Pet. Exhs. A.B. and C offered. Respondent's motion for stay denied. Respondent's motion for dismissal is denied without prejudice to his right to renew motion at some future time. Petitioner's motion for admission to bail to be announced on 10/11/69. Adjourned.

- | | | |
|----------|---|-------|
| 10/11/69 | Filed response | (8) |
| 10/11/69 | Filed notice by the Court as to when the ruling on petitioner's application for bail will be entered | (9) |
| 10/11/69 | Filed opinion and order of the Court and attached Ex. A. By direction of the Court, certified copy of this document served on respondent in person by the U. S. Marshal. Return of service made and filed | (10) |
| 10/11/69 | Filed appearance bond | (11) |
| 10/13/69 | Filed order setting a briefing schedule | (12) |
| 10/20/69 | Filed order requesting comment on statements contained in opinion of the Supreme Court of Wisconsin entered on 10/17/69. Copies mailed. | (13) |
| 11/1/69 | Filed clerk's copy of pet's. brief in support of pet. for writ of habeas corpus | (13½) |
| 11/4/69 | Filed petitioner's motion to modify travel restrictions. Served on Atty. Gen. Warren by the U.S. Marshal. Return on back of motion | (14) |

- 11/4/69 Filed order granting petitioner's motion to modify travel restrictions. Copy served on Atty. Gen. Warren. U.S. Marshal's return on back of motion. Copy mailed to Mr. Julian (15)
- 11/26/69 Filed motion by plaintiff to modify travel restrictions with David S. Hansen, Asst. Atty. Gen's no objection on back (16)
- 11/26/69 Filed order granting plaintiff's motion for modification. Copies mailed. (17)
- 12/5/69 Cases called for consolidated hearing. (69-C-235 and 69-C-241). Appearances: Percy L. Julian, James M. Shellow, Gilda B. Shellow, William M. Coffey, and Robert H. Friebert, attorneys for plaintiff petitioner. Sverre O. Tinglum and David Hanson, Asst. Atty. Gens., attorneys for defts. respondents. Arguments. Taken under advisement.
- 1/5/70 Filed petitioner's motion to modify travel restrictions with accompanying affidavit. (18)
- 1/5/70 Filed copy of petitioner's motion to modify travel restrictions with accompanying affidavit with counsel for respondent's consent to the modification. (19)
- 1/6/70 Filed order granting motion of petitioner for modification of travel restrictions. Copy mailed to counsel. (20)
- 1/8/70 Filed petitioner's motion to modify travel restrictions. (21)

- 1/9/70 Filed order modifying petitioner's travel restrictions. Copy mailed. (22)
- 1/20/70 Filed copy of motion for re-hearing supporting brief before Wis. Supreme Court and denial (23)
- 1/23/70 Filed petitioner's motion to modify travel restrictions. (24)
- 1/23/70 Filed order granting petitioner's motion to modify travel restriction. (25)
- 2/20/70 Filed motion to modify travel restrictions of petitioner. (26)
- 2/20/70 Filed order granting petitioner's motion to modify travel restrictions. Copy mailed. (27)
- 4/8/70 Filed opinion and order granting petition for writ of habeas corpus, denying respondents' motion to dismiss, vacating order of 10/11/69 and releasing petitioner from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on 10/1/69. (28)
- 5/6/70 Filed respondent's notice of appeal. Copies mailed to William M. Coffey. (29)
- 6/12/70 Certified Record on Appeal forwarded to the Hon. Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, by first-class certified mail. Copies of covering letter and record pages mailed to counsel.

PETITION FOR WRIT OF HABEAS CORPUS

(Caption Omitted)

The petitioner, JAMES E. GROPPi, by his attorneys, WILLIAM M. COFFEY, JAMES M. SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the court and alleges as follows:

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 *et. seq.* to release the petitioner from the custody of the respondent which custody is in violation of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. That the petitioner is a citizen of the State of Wisconsin and of the United States.

3. That the petitioner is imprisoned and restrained of his liberty in the Dane County Jail by the respondent, JACK LESLIE, Sheriff of Dane County, Dane County, Wisconsin.

4. That the petitioner is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such a judgment or order.

5. That the cause of the imprisonment and detention of the petitioner in the Dane County Jail is an arrest upon an order and judgment of the Assembly of the State of Wisconsin pursuant to the provisions of § 13.26 and 13.27, Wis. Stats.

6. That the petitioner, by a separate action, *Father James E. Groppi v. Harold Froelich*, No. 69-C-235, in the United States District Court for the Western District of Wisconsin, has caused the court to request the convening of a three-judge federal court to consider the constitutionality of the statutes by which the petitioner is detained by the respondent.

7. That the petitioner has exhausted his state remedies as follows:

a. On October 6, 1969, at 1:30 p.m., attorneys for the petitioner presented to the Clerk of the Circuit Court for Dane County a Writ of Habeas Corpus and were assigned to the Honorable W. L. Jackman, Circuit Judge of Dane County, Wisconsin.

b. That at 1:45 p.m., on October 6, 1969, Judge Jackman was informed of the existence of said Writ and at 2:30 p.m. he signed an order granting the issuance of habeas corpus. The attorneys for the petitioner urged that an immediate hearing be held on the Writ, or in the alternative, if Judge Jackman could not hear it immediately, assign it to an available Circuit Judge. Judge Jackman refused to permit the transfer of the cause and made the Writ returnable before him at 8:30 a.m. on October 7, 1969. He stated that he would not hear the matter on the afternoon of October 6, 1969, on the grounds that he was engaged in a trial and his calendar would not permit an earlier hearing. Earlier in the day and in a related matter brought by the Attorney General (*State of Wisconsin ex rel. Robert Warren v. James E. Groppi*) the attorneys for petitioner were advised that if that matter were not concluded prior to the commencement of Judge Jackman's 1:30 p.m. trial, the Attorney General's action would be continued in evening sessions on October 6, 1969.

c. That at 8:30 a.m., October 7, 1969, the respondent, the Sheriff of Dane County, filed his return to the Writ of Habeas Corpus which asserted that the petitioner was held pursuant to the authority of the Assembly Resolution of October 1, 1969; the attorneys for petitioner demurred to the return and placed in issue the constitutionality of the procedures by which the petitioner is detained.

d. Argument was had on the Writ and the matter was taken under advisement by Judge Jackman. In response to inquiries by the attorneys for petitioner as to when the matter would be decided, the Judge stated he could not advise regarding the decision time. This statement by the court is attached hereto and made a part hereof as though fully set forth herein.

e. Upon his refusal to advise counsel of a decision time, attorneys for petitioner moved that the petitioner be released on bail pending a determination of the issues.

f. At approximately 9:30 a.m., the attorneys for petitioner appeared before the Honorable E. Harold Hallows, Chief Justice of the Wisconsin Supreme Court and presented to the Chief Justice and three members of the court an Order to Show Cause why they should not be allowed to commence an original action in habeas corpus in the Wisconsin Supreme Court.

g. In the course of the conversation, the Chief Justice indicated that he had talked to Judge Jackman by telephone and had been informed that Judge Jackman would not rule on the petition for habeas corpus until at least 12:00 noon on October 8, 1969, at the earliest. The Chief Justice then stated that he would not, on behalf of the court, sign the Order to Show Cause before Judge Jackman's decision. The Chief Justice did state, however, that the Supreme Court would entertain an Emergency Application for Bail at 11:30 a.m. on October 7, 1969. The Chief Justice further indicated that at that time the attorneys for the petitioner could again take up with the court the matter of the Order to Show Cause.

h. At approximately 10:45 a.m., the unsigned Order to Show Cause and accompanying petition were served on Robert Warren, Attorney General of the State of Wisconsin, and subsequently an Emergency Application for Bail was served on

his office. Copies of said Order to Show Cause and Emergency Application for Bail are attached hereto and made a part hereof as though fully set forth herein.

i. At approximately 11:15 a.m., the attorneys for petitioner were informed by Franklin Clarke, Clerk of the Wisconsin Supreme Court, that the hearing on the Emergency Application for Bail and Order to Show Cause had been continued to 2:00 p.m., October 7, 1969.

j. The petitioner and attorneys for petitioner had requested action by the Wisconsin Supreme Court because the proceedings before Judge Jackman did not afford the petitioner with "prompt access to a state court with adequate power to act on the merits of his claim and . . . a determination of his claim with extraordinary promptness."

k. At or about 2:00 p.m. on October 7, 1969, after argument, the Supreme Court declined to issue the Order to Show Cause on the grounds that the matter was pending before Judge Jackman. Further, the court declined to enlarge the petitioner on bail but without prejudice to renew the application for bail if and when the court decided to exercise its discretionary jurisdiction to issue the Order to Show Cause.

l. In all of the above petitions, the attorneys for the petitioner, on behalf of the petitioner, alleged that petitioner's confinement without bail violated rights guaranteed to him by the United States Constitution and the Wisconsin State Constitution, including the Eighth and Fourteenth Amendments to the United States Constitution.

8. That your petitioner has reason to believe and does believe that there was no process issued by any Court upon a showing of probable cause.

9. That your petitioner has reason to believe and does believe that the imprisonment of the petitioner is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Petitioner has been and is being held without bail.

b. With respect to the alleged violations of §§13.26 and 13.27, Wis. Stats., the petitioner has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Petitioner has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedure employed constitutes a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the petitioner is restrained of his liberty directs that the petitioner be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney of Dane County for his further action pursuant to the purported authority of §13.27(2), Wis. Stats. Said section subjects the petitioner to further restraint of his liberty upon proof of the legislative contempt resolution, thereby twice denying him an

opportunity to defend himself against the alleged charges and to confront the witnesses against him. It further places the petitioner twice in jeopardy for the same alleged offense.

e. That upon information and belief, the attorneys for the petitioner have reason to believe and do believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the petitioner's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the date of the alleged disorderly conduct offense, or October 1, 1969, the date on which the resolution was passed.

10. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the petitioner is restrained of his liberty is attached hereto and made a part hereof.

11. That the remedies available to the petitioner in the courts of the State of Wisconsin are ineffective to protect the rights of the petitioner in that they have not permitted the petitioner prompt access to a state court with adequate power to act on the merits of his claim *and* a determination of his claim with the extraordinary promptness required by this court in *Father James E. Groppi v. Harold Froelich*, No. 69-C-235, dated October 6, 1969. Further, said remedies are ineffective to protect the rights of the petitioner and petitioner has exhausted his state remedies because said remedies have failed in fact to provide petitioner with the relief required by the Constitution of the United States *and* with a determination of his claim with extraordinary promptness.

12. That the courts of the State of Wisconsin cannot afford petitioner a review of the facts surrounding and underlying his being held in contempt. The remedy provided by the state

courts is, therefore, inadequate to protect the rights of the petitioner.

WHEREFORE, the attorneys for the petitioner pray that a Writ of Habeas Corpus issue out of and under the seal of this Court, commanding that the respondent or his deputies or assistants who presently hold the body of the petitioner in their custody bring him forthwith before this Court and then and there show the cause of his detention, and that pending the determination of this Writ of Habeas Corpus and the constitutional issues raised in *James E. Groppi v. Harold Froelich* (No. 69-C-235, United States District Court for the Western District of Wisconsin) and any related actions pending in Wisconsin state courts, the petitioner be enlarged on such bail as to this court seems reasonable and just, and for such other and further relief as to this court appears equitable and just.

Respectfully submitted,

/s/ William M. Coffey

WILLIAM M. COFFEY

/s/ James M. Shellow

JAMES M. SHELLOW

/s/ Percy L. Julian, Jr.

PERCY L. JULIAN, JR.

(Verification Omitted)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

DANE COUNTY

CIRCUIT COURT

STATE OF WISCONSIN, ex rel.

JAMES E. GROPPi,

Petitioner,

v.

128426

JACK LESLIE, Sheriff of Dane

County,

Respondent.

WRIT OF HABEAS CORPUS

IN THE NAME OF THE STATE OF WISCONSIN: To JACK LESLIE, Sheriff of Dane County, Wisconsin, or his deputies or assistants who now has or have in his or their custody the person of JAMES E. GROPPi by whatever name said person is known:

YOU ARE HEREBY COMMANDED to have the body of the relator, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before the Honorable *W. L. Jackman*, Judge of the Circuit Court at 8:30 a.m. on the 7th day of October, 1969, in his courtroom at the City-County Building, to do and receive what shall then and there be considered concerning said relator.

AND HAVE YOU THEN AND THERE THIS WRIT.

Witness my hand and seal this 7th day of October, 1969.

/s/

Clerk

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

DANE COUNTY

CIRCUIT COURT

STATE OF WISCONSIN ex rel.

JAMES E. GROPPi,

Petitioner,

v.

Case No. 128426

JACK LESLIE, Sheriff of

Dane County,

Respondent.

ORDER GRANTING WRIT OF HABEAS CORPUS

On reading and filing the verified petition of WILLIAM M. COFFEY, from which it appears that JAMES E. GROPPi is illegally imprisoned and restrained of his liberty by one JACK LESLIE, Sheriff of Dane County, Wisconsin, and the undersigned being satisfied therefrom that a Writ of Habeas Corpus should issue:

IT IS ORDERED that a Writ of Habeas Corpus issue out of and under the seal of the Circuit Court of Dane County, Wisconsin, directed to the said JACK LESLIE, commanding him to produce the body of said JAMES E. GROPPi before me in my courtroom at the City-County Building at Madison, Wisconsin, at 8:30 o'clock in the forenoon on the 7th day of October, 1969, to do and receive what shall then and there be considered concerning the said JAMES E. GROPPi, and to certify and return therewith the time and cause of his imprisonment or restraint.

Dated this 7th day of October, 1969, at Madison, Wisconsin.

BY THE COURT:

/s/ W. L. Jackman

CIRCUIT COURT

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

DANE COUNTY

CIRCUIT COURT

STATE OF WISCONSIN ex rel.

JAMES E. GROPP,

Relator,

v.

128426

JACK LESLIE, Sheriff of

Dane County,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable _____, Judge of the
Circuit Court of Dane County, Wisconsin:

The petition of WILLIAM M. COFFEY respectfully represents and shows to the Court as follows:

1. That your petitioner is an attorney at law, is licensed to practice in the State of Wisconsin, and is one of the attorneys representing the relator.
2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the respondent, JACK LESLIE, Sheriff of Dane County, Wisconsin.
3. That the relator is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such a judgment or order.
4. That your petitioner has reason to believe and does believe that the cause of the imprisonment and detention of the

relator is an arrest upon an order and resolution of the Assembly of the State of Wisconsin pursuant to the purported authority of the provisions of §§ 13.26 and 13.27 Wis. Stats.

5. That your petitioner has reason to believe and does believe that there was no process issued by any Court upon a showing of probable cause.

6. That your petitioner has reason to believe and does believe that the imprisonment of the relator is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Relator has been and is being held without bail.

b. With respect to the alleged violations of §§ 13.26 and 13.27 Wis. Stats., the relator has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Relator has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedure employed constitutes a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty directs that the relator be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney of Dane County for his

further action pursuant to the purported authority of § 13.27 (2) Wis. Stat. Said section subjects the relator to further restraint of his liberty upon proof of the legislative contempt resolution thereby twice denying him an opportunity to defend himself against the alleged charges and to confront the witnesses against him. It further places the relator twice in jeopardy for the same alleged offense.

e. That upon information and belief, your petitioner has reason to believe and does believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the relator's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the day of the alleged disorderly conduct, or October 1, 1969, the date on which the resolution was passed.

7. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty is attached hereto and made a part hereof.

8. That this petition is made pursuant to the provisions of Chapter 292 Wis. Stats., and is in support of the Writ of Habeas Corpus to which it is annexed.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issue out of and under the seal of this Court, commanding that the respondent or his deputies or assistants who presently hold the body of the relator in their custody bring him forthwith before this Court and then and there show the cause of his detention.

/s/ William M. Coffey
WILLIAM M. COFFEY

(Verification Omitted)

1969 Spec. Sess. ASSEMBLY RESOLUTION

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN

DANE COUNTY

CIRCUIT COURT

STATE OF WISCONSIN ex rel.

JAMES E. GROPPi,

Petitioner,

No. 128426

v.

JACK LESLIE, Sheriff of
Dane County,RETURN TO WRIT OF
HABEAS CORPUSRespondent.

STATE OF WISCONSIN)

)

COUNTY OF DANE)

Vernon G. Leslie, sheriff of Dane county, Wisconsin, being first duly sworn, for return to the within writ of habeas corpus, on oath states as follows:

1. That he has the above named relator in his custody and under his power.

2. That the authority and true cause of such imprisonment is that on October 1, 1969 the Wisconsin Assembly passed a Resolution in which it found the relator, James E. Groppi, guilty of contempt of the Assembly committed on September 30, 1969, in the immediate view of the house and directly tending to interrupt its proceedings during a meeting of the 1969 regular session of the Wisconsin legislature, ordered the imprisonment of the said relator for a period of 6 months or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail, and directed the respondent as sheriff of Dane county to seize the relator and deliver him to the jailer of the Dane county jail.

3. That a true copy of the certified copy of the said Resolution is annexed to this return and made a part hereof.

4. In obedience to the command of said writ, respondent has the body of the said relator present before the court at the time and place specified in the said writ.

/s/ Vernon G. Leslie

Subscribed and sworn to before me
this 7th day of October, A.D. 1969.

/s/

I, Wilmer H. Struebing, Assembly Chief Clerk, do hereby certify that the attached Assembly Resolution Special Session 6 was passed by the Assembly on the 1st day of October, 1969.

/s/ Wilmer H. Struebing
WILMER H. STRUEBING

1969 Spec. Sess. ASSEMBLY RESOLUTION 6

September 30, 1969 - Introduced by COMMITTEE ON RULES,
by request of Assemblymen Sensenbrenner, Olson, Klicka,
Nitschke, McDougal, Parkin, Schwefel, Lynn and Bock.

Citing James E. Groppi for contempt of the Assembly
and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

EXHIBIT ATTACHED TO PETITION

STATE OF WISCONSIN Ex Rel JAMES E. GROPPi

v.

JACK LESLIE, SHERIFF OF DANE COUNTY

Case No. 128-426

10-7-69

THE COURT: All right; well, I'm not going to decide this from the bench--it's too involved. I'm just not going to do it. I'm going to take the time to look at these authorities that have been cited to me and to read them because this is, you might say, a rather obscure issue and one that there isn't a great deal of authority on. It's unusual; and I'll get out something on this just as soon as I possibly can.

MR. COFFEY: Your Honor, I move that this Court release Father Groppi from his confinement on bail pending determination of this Court on the writ of habeas corpus presently pending before it.

THE COURT: No. Your motion is denied.

MR. SHELLOW: Your Honor, when will this Court rule on this matter?

THE COURT: Just as soon as I can. You brought this in at 2:30 yesterday afternoon.

MR. SHELLOW: That's correct.

THE COURT: And you asked me to set it as promptly as possible. I have done so and this is a matter of some concern to Father Groppi and it's a matter of some concern to the State. Now, you went to the federal court, the federal court took the weekend and came up with the result that he should pass the ball to me, which I'm perfectly willing to accept and I'm willing to work on this right away. You have an injunction proceeding which I'm working on also, which was heard yesterday morning, and I'm trying to conclude that as promptly as possible. This will take precedence.

MR. SHELLOW: Your Honor, may we have some indication from the Court? Our client is locked up in prison.

THE COURT: I appreciate that and he has been for a week.

MR. SHELLOW: That's right, illegally, we contend. If he has a right to be free, he has a right to be free this minute.

THE COURT: That may well be but I haven't held in your favor yet. As soon as I do we will; but I'm not going to snap-judge this matter, which is what you're saying to me.

MR. SHELLOW: I ask only for a time when we can know.

THE COURT: I can't give you a time. Father Gröppi will know as soon as it occurs.

MR. WARREN: Your Honor, might I raise the point that I'm not sure whether we're at all proper in arguing all these facts. I understood that the petitioners demur to the return and in my way of thinking that would admit the facts that are on our return; and yet we've been involved in all sorts of factual arguments where they talk about what legislators were there and whether or not they were in session; and yet I think they're bound by their pleadings in this case.

MR. SHELLOW: Our pleadings say the legislature was not in session and that is a matter that we will bring before the Court on a later occasion.

THE COURT: All right; court will be in recess.

(Which concluded the proceedings)

EXHIBIT ATTACHED TO PETITION**STATE OF WISCONSIN
IN SUPREME COURT**

STATE OF WISCONSIN, ex rel.)	
JAMES E. GROPP,)	
)	
Petitioner,)	
)	
v.)	
)	Case No.
JACK LESLIE, Sheriff of)	
Dane County,)	
)	
Respondent.)	

ORDER TO SHOW CAUSE

On reading and filing the verified petition of WILLIAM M. COFFEY, JAMES M. SELLOW, and PERCY L. JULIAN, for leave to commence an original action for a Writ of Habeas Corpus:

IT IS HEREBY ORDERED that JACK LESLIE, Sheriff of Dane County, Wisconsin, show cause before this Court at its Courtroom in the State Capitol Building, Madison, Wisconsin, on the day of October, 1969, at o'clock in the noon, or as soon thereafter as Counsel may be heard, why this Court should not grant leave to the petitioner to commence an original action for a Writ of Habeas Corpus as prayed for in said petition.

Let a copy of this Order to Show Cause, together with a copy of the Petition, be served on the Honorable ROBERT WARREN, Attorney General of the State of Wisconsin and on

JACK LESLIE, Sheriff of Dane County, Wisconsin, not later than o'clock in the noon on the day of October, 1969.

Dated at Madison, Dane County, Wisconsin, this day of October, 1969.

JUSTICE

EXHIBIT ATTACHED TO PETITION

**STATE OF WISCONSIN
IN SUPREME COURT**

STATE OF WISCONSIN, ex rel.)	
JAMES E. GROPP,)	
)	
Petitioner,)	
)	
v.)	Case No.
)	
JACK LESLIE, Sheriff of)	
Dane County,)	
)	
Respondent.)	

**PETITION FOR LEAVE TO COMMENCE AN ORIGINAL
ACTION FOR WRIT OF HABEAS CORPUS**

**TO THE HONORABLE SUPREME COURT OF THE
STATE OF WISCONSIN:**

The petition of WILLIAM M. COFFEY, JAMES SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the Court and alleges as follows:

1. That the petitioners are attorneys duly licensed to practice in the State of Wisconsin and are three of the attorneys representing the above-named relator, JAMES E. GROPPI.

2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the Respondent.

3. That the relator is not committed or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of an execution issued upon such a judgment or order.

4. That your petitioners have reason to believe and do believe that the cause of the imprisonment and detention of the relator is an arrest under an order and resolution of the Assembly of the State of Wisconsin pursuant to the purported authority of §§13.26 and 13.27, Wis. Stats.

5. That on the 6th day of October, 1969, petitioner obtained a Writ of Habeas Corpus from the Circuit Court of Dane County, Wisconsin; that a hearing was scheduled on said Writ for the 7th day of October, 1969, at 8:00 o'clock in the forenoon before the Honorable W. L. Jackman, Circuit Judge, presiding, and that pending a hearing on this Writ, the relator was remanded to the custody of the respondent. The delay of the hearing on this Writ of Habeas Corpus denies to the relator "a determination of his claim with extraordinary promptness" as required by the opinion of the Honorable James E. Doyle, United States District Judge for the Western District of Wisconsin, in the case of *Father James E. Groppi v. Harold Froelich, et al.*, No. 69-C-235, dated October 6, 1969.

6. That your petitioners have reason to believe and do believe that there was no process issued by any Court upon a showing of probable cause.

7. That your petitioners have reason to believe and do believe that the imprisonment of the relator is in violation of the Constitution and laws of the State of Wisconsin and the Constitution of the United States in the following respects:

a. Relator has been and is being held without bail.

b. With respect to the alleged violations of §§13.26 and 13.27, Wis. Stats., the relator has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and the cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.

c. Relator has not been restrained of his liberty as a result of any violation of any rules of the Assembly of the State of Wisconsin, but rather has been restrained of his liberty for an alleged violation of a statute of the State of Wisconsin which purports to make his conduct punishable by criminal or criminal-type sanctions; therefore, the procedures employed constitute a bill of attainder and/or pains and punishments.

d. The resolution of the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty directs that the relator be so restrained for six months or for the duration of the 1969 Regular Session, whichever is briefer. The resolution further directs that a copy of the same be transmitted to the District Attorney for Dane County for his further action pursuant to the purported authority of §13.27(2), Wis. Stats. Said section subjects the relator to further restraint of his liberty upon proof of the legislative contempt resolution thereby twice denying him an opportunity to defend himself against the alleged charges and to confront

the witnesses against him. It further places the relator twice in jeopardy for the same alleged offense.

e. That upon information and belief, your petitioners have reason to believe and do believe that the acts of the Assembly of the State of Wisconsin in passing the resolution and in restraining the relator's liberty were illegal in that said Assembly was not legally or validly in either regular or special session on September 29, 1969, the date of the alleged disorderly conduct, or October 1, 1969, the date on which the resolution was passed.

8. A copy of the resolution passed by the Assembly of the State of Wisconsin pursuant to which the relator is restrained of his liberty is attached hereto and made a part hereof.

9. That the relator can appeal to the Wisconsin Supreme Court from the order of the Honorable *W. L. Jackman*, Circuit Judge, whereby the relator was remanded to the custody of the respondent pursuant to the provisions of §§274.05 and 274.11, Wis. Stats., but the petitioners have reason to believe and do believe that such an appeal could not be decided by the Wisconsin Supreme Court before the first week in December, 1969, at the earliest, and that in the interim, the relator would remain in custody due to said improper arrest, detention and denial of bail and would thereby suffer irreparable harm; that an appeal to the Supreme Court of Wisconsin from the order of the Circuit Court of Dane County, Wisconsin, quashing the Writ of Habeas Corpus is not an adequate remedy.

WHEREFORE, your petitioners pray that this Court grant them leave to commence an Original Action for a Writ of Habeas Corpus against the respondent in the Supreme Court of Wisconsin.

Dated at Madison, Dane County, Wisconsin, this 6th day
of October, 1969.

/s/ William M. Coffey
WILLIAM M. COFFEY

/s/ James Shellow
JAMES SHELLOW

/s/ Percy L. Julian, Jr.
PERCY L. JULIAN, JR.

(Verification Omitted)

EXHIBIT ATTACHED TO PETITION

**STATE OF WISCONSIN
IN SUPREME COURT**

STATE OF WISCONSIN, ex rel.

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE, Sheriff of Dane

County,

Respondent.

**EMERGENCY APPLICATION FOR BAIL PENDING
ACTION ON PETITION FOR LEAVE TO COMMENCE
AN ORIGINAL ACTION FOR WRIT OF HABEAS CORPUS**

The petition of WILLIAM M. COFFEY, JAMES SHELLOW, and PERCY L. JULIAN, JR., respectfully shows to the court and alleges as follows:

1. That the petitioners are attorneys duly licensed to practice in the State of Wisconsin and are three of the attorneys representing the above-named relator, JAMES E. GRÖPPI.

2. That the relator is imprisoned and restrained of his liberty in the Dane County Jail by the respondent.

3. That the Honorable W. L. Jackman, Circuit Judge of Circuit Court Branch II, Dane County, presently has the matter which is the subject of the action for a Writ of Habeas Corpus under advisement, and has refused relator's motion for bail pending said judge's determination.

4. That the petitioners hereby petition this court for an order granting to the relator bail pending the determination of the Circuit Court of Dane County and pending this court's determination with respect to the petition for leave to commence an original action for Writ of Habeas Corpus, and pending this court's action, if any, upon an appeal or action otherwise taken, from the decision of the Circuit Court of Dane County.

5. That the grounds for this motion are that by reason of the Eighth and Fourteenth Amendments to the United States Constitution the relator is entitled to bail pending a determination of the issues raised in both the Circuit Court of Dane County and in this court, as well as the issues raised under the United States Constitution in said courts and in the United States District Court for the Western District of Wisconsin.

Dated this 7th day of October, 1969.

Respectfully submitted,

WILLIAM M. COFFEY

JAMES SHELLOW

PERCY L. JULIAN, JR.

EXHIBIT ATTACHED TO PETITION

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

FATHER JAMES E. GROPP,
Plaintiff

OPINION AND ORDER

v.

69-C-235

HAROLD FROELICH, individually and
as Speaker of the Wisconsin Assembly
and as a representative of a class
known as "Members of the Wisconsin
Assembly";

JAMES BOLL, individually and as
District Attorney of Dane County,
Wisconsin;

VERNON T. LESLIE, individually and as
Sheriff of Dane County, Wisconsin,

Defendants

This is an action in which the plaintiff attacks the validity, under the Constitution of the United States, of § 13.26 and § 13.27 of the Wisconsin Statutes, and in which he also alleges that §§ 13.26 and 13.27, even if valid, are being invoked for the unlawful purpose of depriving him of certain rights secured to him by the Constitution of the United States. The plaintiff seeks a judgment declaring that §§ 13.26 and 13.27 violate the Constitution of the United States, an injunction restraining the defendants from enforcing or executing §§ 13.26 and 13.27, and an injunction restraining the defendants from refusing to release plaintiff forthwith from imprisonment.

The plaintiff has moved for a temporary restraining order by which the defendants would be restrained from further enforcement of §§ 13.26 and 13.27 against the plaintiff or, in

the alternative, a temporary order that the plaintiff be released from prison forthwith upon his own recognizance pending final disposition of this action.

This opinion and order is limited to the questions raised by the plaintiff's motion for a temporary restraining order.

From the allegations of the complaint, from certain documents offered by the defendants at the hearing on the motion for a temporary restraining order and received without objection on the part of the plaintiff, and from representations of counsel at the said hearing concerning which there is no disagreement, I make the following findings of fact, for the limited purpose of acting upon the motion for a temporary restraining order.

On October 1, 1969, the Assembly, which is one of the two houses of the Wisconsin state legislature, adopted a resolution citing the plaintiff herein for contempt of the Assembly. The resolution recited that the plaintiff herein had led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty. The resolution contained a finding by the Assembly that the said action by the plaintiff constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings". The resolution recited that the said conduct is an offense punishable as a contempt under § 13.26(1)(b), Wis. Stat., and Article IV, Section 8 of the Wisconsin Constitution. The resolution contained a finding that the plaintiff herein was guilty of contempt of the Assembly. By the resolution, the Assembly ordered, in accordance with §§ 13.26 and 13.27,

that the plaintiff be imprisoned for a period of six months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane County Jail. By the resolution the Assembly directed the Sheriff of Dane County to seize the plaintiff and to deliver him to the jailer of the Dane County Jail. Finally, by the resolution, the Assembly directed that a copy of the resolution be transmitted to the District Attorney of Dane County "for further action by him under Section 13.27(2) of the Wisconsin Statutes".

A copy of the said resolution was subsequently served upon the plaintiff. He is presently confined in the Dane County Jail upon the authority of the said resolution. No hearing has been held either in the Assembly or in any court at which the plaintiff herein has been afforded an opportunity to answer to the charge contained in the Assembly resolution.

Article IV, Section 8, Wisconsin Constitution, provides, in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior...."

Section 13.26, Wisconsin Statutes, provides, in part:

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members ... for ...

"....

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27, Wisconsin Statutes, provides:

"(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail."

In this opinion I will consider, first, the plaintiff's motion for temporary relief from his present confinement, and then the plaintiff's motion for temporary relief with respect to a threatened second period of confinement under § 13.27(2).

Present Confinement

The plaintiff's motion now under consideration seeks: (1) a temporary order restraining the defendants from further enforcement of §§ 13.26 and 13.27, Wis. Stat., against the plaintiff; or, in the alternative, (2) a temporary order that the plaintiff be released on bail from his present imprisonment.

Although neither the complaint nor the plaintiff's motion for a temporary restraining order is so phrased, the relief sought is clearly the relief for which a petition for habeas corpus is appropriate. "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." *Walker v. Wainwright*, 390 U.S. 335, 336 (1968).

Jurisdiction has been conferred upon the United States district courts to grant habeas corpus to a prisoner "in

custody in violation of the Constitution . . . of the United States” 28 U.S.C. § 2241(c)(3). However, 28 U.S.C. § 2254 provides that “a person in custody pursuant to the judgment of a State court shall not be granted” federal habeas corpus unless he has previously exhausted the remedies available in the state courts, or unless there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective. The reviser’s note to this statute, enacted in 1948, is that it was declaratory of existing law. 28 U.S.C.A. § 2254, p. 476. See *Ex parte Hawk*, 321 U.S. 114 (1944). The complaint herein does not recite that the plaintiff has exhausted remedies available in the state courts, nor does it recite that there is an absence of state corrective process, nor does it recite the existence of circumstances rendering such process ineffective.

It has been held that when the remedy actually sought is habeas corpus, the requirement of prior exhaustion of state remedies may not be avoided by stating the claim in the language of the Civil Rights Act, 42 U.S.C. § 1983. *Gaito v. Strauss*, 368 F. 2d 787, 788 (3d Cir. 1966), cert. den., 386 U.S. 977; *Johnson v. Walker*, 317 F. 2d 418 (5th Cir. 1963); *Martin v. Roach*, 280 F. Supp. 480 (S.D.N.Y. 1968); *May v. Peyton*, 268 F. Supp. 928 (W.D. Va. 1967); *Davis v. State of Maryland*, 248 F. Supp. 951 (D. Md. 1965); *Threatt v. State of North Carolina*, 221 F. Supp. 858 (W.D.N.C. 1963); 42 U.S.C. § 1983 must be construed in the light of 28 U.S.C. § 2254. Therefore, even if the complaint herein is treated as a petition for habeas corpus, it appears that it may fail for want of a showing that state remedies have been exhausted.

For the reasons stated, plaintiff’s motion for a temporary restraining order with respect to release from his present confinement is hereby denied.

By the ruling just stated, I do not intend to prevent the plaintiff from filing a petition for habeas corpus in this court with respect to his present confinement.

I note that the exact language of 28 U.S.C. § 2254 is that federal habeas corpus shall not be granted to "a person in custody pursuant to the judgment of a State court" unless certain conditions, stated above, have been met. It appears that this plaintiff is not in custody pursuant to the judgment of any court. There has been no opportunity as yet to determine whether § 2254 should be construed to apply to a person in custody pursuant to a resolution of a house of a state legislature, nor to determine the legal consequences if § 2254 is not so construed.

Moreover, even under § 2254 one is eligible for federal habeas corpus, when confined in violation of the Constitution of the United States, if it can be shown that there is an absence of available state corrective process or that circumstances exist rendering such process ineffective. This case presents an extraordinary situation in which the plaintiff has been confined without the benefit of any of those protections normally considered essential to due process of law. Whether the defendants are prevented by the Constitution of the United States from confining the plaintiff in such an extraordinary manner is the basic issue yet to be determined. In this situation, I would consider that such state corrective process as may be available would be ineffective unless it permitted plaintiff prompt access to a state court with adequate power to act on the merits of his claim, and unless it provided a determination of his claim with extraordinary promptness.

The Threatened "Second" Confinement

A portion of the Assembly resolution directs that a copy of it be transmitted to the Dane County district attorney "for further action by him under Section 13.27 (2)." Section 13.27

contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefore in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail."

Thus it appears that the plaintiff is threatened with a second term of confinement following his present term of confinement, and that the second term of confinement may be invoked in a court proceeding in which it may be necessary for the district attorney only to show that the Assembly did in fact adopt the resolution embodying the contempt citation.

The threat is direct and real. Thus it appears that the defendants, acting under color of state law, are threatening in this way to deprive plaintiff of his freedom. Under 42 U.S.C. § 1983, he is entitled to relief if it can be shown that this threatened deprivation violates the Constitution of the United States. I conclude that it is not an insubstantial or frivolous contention that the guarantee of due process of law embodied in the Fourteenth Amendment would be violated by a procedure in which proof of the adoption of the contempt citation by the Assembly, without more, would trigger a second period of confinement.

Jurisdiction of this claim by the plaintiff is present. 28 U.S.C. § 1343(3). Since injunctive relief against the operation of state statutes, §§ 13.26 and 13.27, is sought, the convening of a three-judge federal court is required. 28 U.S.C. § 2281. Today I am requesting the Chief Judge of the Seventh Circuit to convene such a three-judge court.

With respect to the threatened second confinement, it appears that no temporary restraining order, pending the convening of the three-judge court, is necessary. A three-judge court can be expected to be convened and actually to hold an appropriate hearing before the commencement of the threatened second confinement.

Therefore, with respect to the threatened second confinement, the plaintiff's motion for a temporary restraining order is hereby denied.

With respect to the threatened second confinement, unlike the plaintiff's present confinement, 42 U.S.C. § 1983 appears to afford the plaintiff a remedy, in a proper case, without any requirement that he first exhaust state remedies, *Damico v. California*, 389 U.S. 416 (1967). This distinction between the availability of relief from present confinement and the availability of relief from the threat of future confinement, with respect to the requirement of exhaustion of state remedies, may be anomalous, or it may not, but it is a distinction which appears to exist in the present state of the law.

Entered this 6th day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

EXHIBIT ATTACHED TO PETITION

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

FRANKLIN W. CLARKE
CLERK

Shellow, Shellow, & Coffey
To Attorneys at Law
660 East Mason Street
Milwaukee, Wisconsin 53202

Madison, October 7, 1969

Mr. Robert W. Warren
Attorney General

Mr. Percy L. Julian, Jr.
Attorney at Law
330 East Wilson Street
Madison, Wisconsin 53703

Sir: The Court today announced decision in your case as follows:

STATE OF WISCONSIN, ex rel. JAMES E. GROPPi v. JACK LESLIE, Sheriff of Dane County.

The application for bail is denied without prejudice subject to renewal if this court should grant the petition for leave to commence an original action for writ of habeas corpus.

Respectfully yours,

FRANKLIN W. CLARKE

Clerk of Supreme Court

ORDER

(Caption Omitted)

Petitioner, presently confined in the Dane County Jail, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. The petition alleges that petitioner is being held in custody in violation of his rights under the Constitution of the United States.

I conclude that a response to the petition is required.

Title 28 U.S.C. § 2243 states that the response "... shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed".

Now, Therefore, It Is Ordered: that the respondent file a response not later than three days after service upon him of the petition herein.

Entered this 8th day of October, 1969.

By the Court:

/s/ James E. Doyle

District Judge

ORDER TO SHOW CAUSE

(Caption Omitted)

Upon the verified petition, and exhibits thereto, filed herein by the petitioner James E. Groppi, praying for issuance of a writ of habeas corpus, and praying for release on his own recognizance or on bail pending disposition of his petition for habeas corpus and pending a determination of certain issues raised in *Groppi v. Froelich et al*, W.D. Wis., 69-C-235, and in any related actions pending in Wisconsin state courts,

It is hereby ordered that the respondent Jack Leslie show cause before this Court on October 10, 1969, at 11:00 a.m., why, upon his execution of his own recognizance or upon his depositing bail conditioned upon his appearance in this Court from time to time as may be ordered by this Court, petitioner should not be released from all detention and restraint by the respondent Jack Leslie, pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969, pending disposition of the petition for habeas corpus before this Court or other order of this Court.

Entered this 8th day of October, 1969.

By the Court:

/s/ James E. Doyle

District Judge

ORDER

(Caption Omitted)

The hearing scheduled herein for 11:00 a.m., Friday, October 10, 1969, is hereby postponed until 3:00 p.m., Friday, October 10, 1969.

Entered this 9th day of October, 1969:

By the Court:

/s/ James E. Doyle

District Judge

**MOTION TO DISMISS OR IN THE
ALTERNATIVE TO STAY PROCEEDINGS**

(Caption Omitted)

Respondent moves the court as follows:

1. To dismiss the above entitled action because the petition fails to state a claim upon which relief can be granted, or in the alternative

2. To stay the proceedings including the return in the above entitled action pending exhaustion of state remedies as required pursuant to 28 USCA §2254 (b).

Dated October 9, 1969.

/s/ Robert W. Warren
ROBERT W. WARREN
Attorney General

Attorney for Respondent

AFFIDAVIT

(Caption Omitted)

Robert W. Warren, first being duly sworn, on oath deposes and says:

1. That he is one of the attorneys for the respondent in the above entitled action.

2. That the attached copy of a *per curiam* order of the Supreme Court of the State of Wisconsin dated October 9, 1969, and labeled "Exhibit A", is hereby exhibited to the court as part of this Affidavit in support of respondent's Motion to Dismiss or in the Alternative to Stay Proceedings and that he believes the same to be a true and correct copy of the original.

/s/ Robert W. Warren
ROBERT W. WARREN
Attorney General

Subscribed and sworn to before
me this 9th day of October,
1969.

/s/ Roy G. Mita

Notary Public, Wisconsin

My Commission *permanent*

EXHIBIT A TO AFFIDAVIT

August Term, 1969

STATE OF WISCONSIN

IN SUPREME COURT

State of Wisconsin ex rel.

JAMES E. GROPPi,

Petitioner,

vs.

JACK LESLIE, Sheriff of Dane County,

Respondent.

PER CURIAM. The petitioner James E. Groppi on October 7, 1969, filed a petition for leave to commence an original action in *habeas corpus*. The court waives oral argument and accepts original jurisdiction of the action for the writ of *habeas corpus* and in the interest of saving time and of expediting this cause, the court will consider the petition now on file as the complaint, granting leave to the petitioner to amend his petition as he may desire by 3:00 o'clock p.m. today, October 9th, 1969. Any amendment shall be served upon the Attorney General for the state of Wisconsin, who has represented the respondent in this matter before this court and has been served with the petition. The respondent shall answer the complaint by 9:00 o'clock a.m., tomorrow, October 10, 1969, and serve said answer upon the attorneys for the petitioner.

A hearing on the complaint and answer shall be held at 10:00 o'clock a.m., tomorrow, October 10, 1969, in the Supreme Court court room. The motion for bail is presently under reconsideration by this court upon the renewal motion of the petitioner for bail pursuant to this court's order of October 7, 1969.

ORDER TO SHOW CAUSE

(Caption Omitted)

A Motion to Dismiss or in the Alternative to Stay Proceedings along with a supporting Affidavit having been filed with the court and the court being of the view that the motion should be heard promptly, and being advised in the premises

IT IS HEREWITH ORDERED that the petitioners show cause, if they have any, before this court at 3:00 o'clock in the afternoon on *Friday*, the *10th* day of October, 1969, or as soon thereafter as counsel can be heard, why the attached motion to dismiss or in the alternative to stay proceedings should not be granted.

Let a copy of this order be served on the defendants no later than 10:30 A.M. *October 10, 1969*. Dated this *10th* day of October, 1969, at 9:25 A.M.

BY THE COURT,

/s/ *James E. Doyle*

JAMES E. DOYLE

District Judge

RESPONSE

(Caption Omitted)

Respondent, by Robert W. Warren, Attorney General of Wisconsin, and David J. Hanson, Betty R. Brown and Sverre

O. Tinglum, Assistant Attorneys General, his attorneys, as and for a response to the petition herein admits, denies and alleges as follows:

1. In response to paragraph three, four and five thereof, ADMITS that respondent holds petitioner in custody and that the true cause of the detention is a resolution of the Assembly of the State of Wisconsin dated October 1, 1969, a certified copy of which is attached hereto as Exhibit A.

2. In response to paragraph seven thereof, DENIES that petitioner has exhausted his remedies in the courts of the State of Wisconsin; ALLEGES that petitioner made no good faith effort to obtain relief in the circuit court for Dane county, Wisconsin, but made a perfunctory presentation in that court, which rendered judgment on the merits within 48 hours after the filing of a petition for a writ of habeas corpus there, quashing the writ and dismissing the petition; further ALLEGES that upon petitioner's own motion, the Wisconsin Supreme Court granted leave to petitioner to commence an original action in habeas corpus in that court, and that pursuant to that court's order, issue was joined on October 10, 1969 and oral argument was had at 11:00 a.m. on October 10, 1969, the cause being now under advisement by that court.

3. In response to paragraph nine thereof, DENIES, that petitioner is being detained in violation of any right guaranteed him under the Constitution or laws of the United States; ADMITS that petitioner is held without bail; ALLEGES that petitioner was committed to jail for contempt as set forth in Exhibit A, and that petitioner had no right under the Constitution or laws of the United States to a trial prior to commitment; DENIES that petitioner is detained pursuant to any bill of pains and punishments; DENIES that petitioner has been or will be subjected to double jeopardy within the meaning of the Constitution of the United States; ALLEGES that the Assembly

was validly in session on both September 29, 1969 and October 1, 1969, and that any failure on the part of the Assembly to convene on September 29, 1969 was the immediate result of the unlawful conduct then engaged in by petitioner and others.

4. In response to paragraph eleven thereof, DENIES that the remedies available to petitioner in the Wisconsin courts are ineffective and DENIES that petitioner has exhausted the remedies available in the Wisconsin courts; ALLEGES that the courts of the State of Wisconsin have acted with extraordinary promptness in the consideration of petitioner's claims, and that petitioner has not been hindered or delayed in pursuing said remedies in any fashion; further ALLEGES that petitioner has made no good faith attempt to allow the courts of the State of Wisconsin to consider the merits of his claims in any orderly or deliberate manner.

5. In response to paragraph twelve thereof, ALLEGES that petitioner has made no effort whatever to seek a review in the Wisconsin courts of the facts surrounding his being held in contempt; ALLEGES that petitioner raised no such factual issues in his pleadings in the state courts, and made no attempt to secure a hearing for the determination of such facts.

6. ALLEGES that the petition fails to state a claim upon which relief may be granted.

7. ALLEGES that said petition on its face shows that petitioner has failed to exhaust his remedies in the courts of Wisconsin.

/s/ Robert W. Warren
ROBERT W. WARREN
Attorney General of Wisconsin

DAVID J. HANSON
Assistant Attorney General

BETTY R. BROWN
Assistant Attorney General
SVERRE O. TINGLUM
Assistant Attorney General
Attorneys for Respondent

Post Office Address:

State Capitol
Madison, Wisconsin 53702

EXHIBIT A TO RESPONSE

I, Thomas T. Melvin, Assistant Chief Clerk, do hereby certify that the attached Assembly Resolution Special Session 6 was passed by the Assembly on the 1st day of October, 1969.

/s/ Thomas T. Melvin
THOMAS T. MELVIN

EXHIBIT A

1969 Spec. Sess. ASSEMBLY RESOLUTION

6

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly

tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

MEMORANDUM AND DIRECTIVE

October 11, 1969

11:45 a.m.

Re: *Groppi v. Leslie*, 69-C-241

A ruling on petitioner's application for bail will be entered not later than 4:30 p.m., Monday, October 13, 1969. When a ruling is entered, the clerk will inform counsel by

telephone, and the clerk will also inform any representatives of the news media who request to be telephoned.

/s/ James E. Doyle,
District Judge

ORDER
(Caption Omitted)

Petitioner has filed a petition for habeas corpus. Based upon the allegations of his petition for habeas corpus, including the exhibits thereto, petitioner has also prayed that he be released upon his own recognizance or bail pending a determination in this habeas corpus proceeding, and in a related action in this court (*Groppi v. Froelich et al*, 39-C-235), and in related actions in the Wisconsin state courts. An order to show cause was entered herein October 8, 1969, with respect to the bail question, and a hearing has been held on the question.

This court possesses power to release a habeas corpus petitioner on bail pending a determination of the merits of his petition. *Wright v. Henkel*, 190 U.S. 40, 63 (1903); *Barth v. Clise*, 79 U.S. (12 Wall.) 400, 403 (1872); *In re Kaine*, 55 U.S. (14 How.) 103, 134 (1852); *United States ex rel. Epton v. Nenna*, 281 F. Supp. 388 (S.D.N.Y. 1968); *Application of Stecker*, 271 F. Supp. 406, 407-408 (D.N.J. 1966), *aff'd* 381 F.2d 379 (3d Cir. 1967); *United States ex rel. Mancini v. Rundle*, 219 F. Supp. 549, 552 (E.D. Pa. 1963), *aff'd* 337 F.2d 268 (3d Cir. 1964); *United States ex rel. Ackerman v. Commonwealth of Pennsylvania*, 133 F. Supp. 627, 630 (S.D. Pa. 1955), *aff'd sub nom. Johnston v. Marsh*, 271 F.2d 528 (3d Cir. 1955); *Artukovic v. Boyle*, 107 F. Supp. 11, 15 (S.D. Calif. 1952), *rev'd on other grounds*, 211 F.2d 565 (9th Cir. 1954), *cert. denied* 348 U.S. 818 (1954); *Principe v. Ault*, 62 F. Supp. 279, 284 (N.D. Ohio 1945). See *In re*

Shuttlesworth, 369 U.S. 35 (1962); *Smith v. Davis*, 5th Cir., No. 24649 (April 12, 1967); *Dresner v. Stoutamire*, 5th Cir., No. 21802 (August 5, 1964); *York v. Nichols*, 159 F.2d 147 (1st Cir. 1947). See also *Levy v. Parker*, 38 L.W. 2147 (order entered August 14, 1969, by Mr. Justice Douglas, Associate Justice, United States Supreme Court). See also Rule 49 of the Rules of the Supreme Court of the United States.

The provision of 28 U.S.C. Sec. 2254, that state remedies be exhausted, requires exhaustion before an application for federal habeas corpus is "granted"; it does not deprive the federal district court of jurisdiction, pending the exhaustion of state remedies. *Thomas v. Teets*, 205 F.2d 236, 240 (9th Cir. 1953), cert. den. 346 U.S. 910. Thus, even if it is assumed that Sec. 2254 is applicable to the facts alleged in this petition, the court has jurisdiction to act, short of granting the application for habeas corpus.

I have said that jurisdiction is present, and that power to grant bail, pending a determination of the merits of the petition for habeas corpus, is also present. The question is whether this jurisdiction and this power should be exercised at this particular stage of this particular proceeding.

Upon the basis of the allegations of the petition and return filed herein, and by judicial notice, I find that a petition for habeas corpus, filed by this petitioner in the Circuit Court for Dane County, Wisconsin, alleging the same basic claim for relief, has been dismissed; that on October 9, 1969, the Supreme Court of Wisconsin accepted original jurisdiction of a petition for habeas corpus by this petitioner, alleging the same basic claim for relief; that a hearing on said petition was held in the Supreme Court of Wisconsin October 10, 1969; that the merits of said petition have not yet been acted upon by the Supreme Court of Wisconsin; and that the Supreme Court of Wisconsin has denied the petitioner's application for bail pending a determination on the merits.

An initial question is whether I should refrain from acting upon petitioner's application for bail in this court until the Supreme Court of Wisconsin has acted upon the merits of his petition for habeas corpus.

In *Townsend v. Sain*, 372 U.S. 293, 318 (1963), the Supreme Court of the United States decided:

"Although the (federal) district judge may, where the state court has reliably found the relevant facts, defer to the state court's finding of fact, he may not defer to its findings of law. It is the (federal) district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."

See *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter) (1953); *United States ex rel. Worlow v. Pate*, 411 F.2d 972, 974 (7th Cir. 1969). Should the Supreme Court of Wisconsin grant habeas corpus to the petitioner on the merits, the proceeding here will become moot. On the other hand, should the Supreme Court of Wisconsin deny habeas corpus to the petitioner on the merits, although I would consider carefully its reasoning as well as the reasoning of Judge Jackman, I will be bound to apply the applicable federal law to the facts independently.

The underlying issue in this proceeding is whether the Constitution of the United States forbids the imprisonment of the petitioner by the Assembly in the manner in which he has been imprisoned. The merits of this issue have not yet been reached. However, it is already clear that the issue is of major importance and that it is an issue of considerable difficulty. Even so, in the more usual habeas corpus proceeding in this court, involving a petitioner confined in a state correctional institution pursuant to the judgment of a state court, it would be extraordinary to grant bail pending a determination of the merits of the petition. This is because, in the more usual habeas corpus proceeding, the petitioner has already

had the opportunity in a state court to defend against the charge; he has been convicted either upon a plea of guilty or upon a verdict of guilty; and he has had the opportunity to have his case reviewed by an appellate court. Under these more usual circumstances, although the petitioner may ultimately prevail in the habeas corpus proceeding, it is hardly sensible to release him from prison, on bail, merely on the strength of the allegations in his petition.

In the present case, on the other hand, the petitioner has been afforded no hearing of any kind, either in the Assembly which cited him for contempt and caused him to be confined, or in any court, on the truth or falsity of the charge against him or on the validity of any defense which he may desire to raise against the charge.

I understand the contention of the respondent that, in terms of constitutional power, the legislature is free to imprison the petitioner in just this manner, and I imply no opinion on that issue. But in terms of reasonableness of admitting a petitioner to bail pending a decision on the merits of his petition, I consider that there is a sharp difference between the case of a petitioner who has been imprisoned without any hearing whatever and the case of a petitioner who has had the benefit of the full panoply of procedural due process available in the usual criminal prosecution in the courts.

One further question deserves comment. The Assembly has sentenced petitioner to be imprisoned "for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer". The question is whether by the very act of admitting the petitioner to bail, the court would inevitably and irrevocably thwart the Assembly's intended punishment. This is a possibility. Thus, if the petitioner were admitted to bail, and if the 1969 regular session were to end the next day, it would probably be beyond the power of the court to order the petitioner's return to jail even if his petition for habeas corpus

were determined to have no merit. However, the probability is strongly otherwise. The 1967 regular session of the legislature ended January 6, 1969. The 1965 regular session ended either January 2, 1967, or January 11, 1967. The 1963 regular session ended January 13, 1965. Thus, it appears that an interval in which the petitioner is enlarged on bail will probably not prevent his serving a complete term of six months in jail, should his petition for habeas corpus be determined against him.

For the reasons stated herein, and upon the basis of the entire record, it is ordered that the respondent produce the petitioner herein before the clerk of this court, within 4 hours from the entry of this order, to permit the petitioner to execute an appearance bond in the form of the bond attached hereto as Appendix A, and made a part hereof; and

It is hereby further ordered, that upon the execution of said bond by the petitioner, the respondent shall forthwith release the petitioner from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969, until further order of this court.

Entered this *11th* day of October, 1969, at 4:00 o'clock in the afternoon.

By the Court:

/s/ James E. Doyle
District Judge

APPEARANCE BOND
(Caption Omitted)

The undersigned acknowledges that he and his personal representative are bound to pay to the United States of America the sum of Five Hundred dollars (\$500.00).

The conditions of this bond are that the petitioner is to appear in the United States District Court for the Western District of Wisconsin, in accordance with any and all orders and directions relating to the petitioner's appearance in the above entitled matter as may be given or issued by the United States District Court for the Western District of Wisconsin; that the petitioner is not to depart the State of Wisconsin; that the petitioner is not to enter the area bounded by the north curblin and extended curblin of Doty Street, the west curblin and extended curblin of Webster Street, the south curblin and extended curblin of Dayton Street, and the east curblin and extended curblin of Fairchild Street, all in the City of Madison, Wisconsin; that the petitioner is to abide any order or judgment which may be entered in this proceeding by surrendering himself to serve any sentence imposed by the Assembly of the State of Wisconsin and by obeying any order or direction in connection with such sentence as this court may prescribe.

If the petitioner appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the petitioner fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against petitioner for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the laws of the United States; also, upon such forfeiture, a bench warrant for the arrest of the petitioner may be issued forthwith and he may be returned to the custody of the respondent.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned is duly exonerated of the condition of the bond.

This bond is signed on this ... day of October, 1969, at Madison, Wisconsin.

Name of Petitioner: Address:

Signed and acknowledged before me this ... day of October, 1969.

.....
Clerk, United States District Court,
Western District of Wisconsin

ORDER

(Caption Omitted)

Petitioner's brief in support of the petition is to be served and filed by October 24, 1969; respondent's answering brief by November 7, 1969; and petitioner's reply brief, if petitioner elects to serve and file a reply brief, by November 14, 1969.

When the briefing has been completed, the court will advise whether a hearing is to be held and, if so, the nature of the hearing and the date of the hearing. In the briefs, counsel are invited to express their views concerning the necessity for an evidentiary hearing.

Entered this 13th day of October, 1969.

By the Court:

/s/ James E. Doyle
District Judge

MOTION FOR RE-HEARING

(Formal Parts Omitted)

The Petitioner, by his Attorneys, SHELLOW, SHELLOW & COFFEY, and PERCY JULIAN, JR., hereby moves the Court for a re-hearing of its decision dated October 17, 1969.

Dated this 23rd day of October, 1969.

Respectfully submitted,

JAMES E. GROPPi, Petitioner

By PERCY JULIAN, JR., and
SHELLOW, SHELLOW
& COFFEY

ROBERT H. FRIEBERT

P. O. ADDRESS:

660 East Mason Street
Milwaukee, Wisconsin 53202

BRIEF IN SUPPORT OF MOTION FOR RE-HEARING

(Formal Parts Omitted)

The Petitioner wishes to raise three points on this motion for rehearing.

There were two separate issues raised with respect to the form of the Assembly Resolution. Only one of those questions was answered by the Court when the Court held that the Governor of the State of Wisconsin maintains the power to call a Special Session of the Assembly even though the Regular Session of the Assembly had not adjourned, *sine die*. The other question, which was not answered by the Court was whether a Special Assembly Resolution could condemn the action of the Petitioner and hold him in contempt of a regular session of the Assembly and further order him into confinement until adjournment of the Regular Session of the Assembly. Sec. 13.26 and Sec. 13.27, Wis. Stat. do not allow punishment of one Session of the Legislature by another Session of the Legislature. Sec. 13.26(2) states:

"(2) The term of imprisonment a House may impose under this Section shall not extend beyond *the same session* of the Legislature." (Emphasis supplied).

Thus, the Special Session of the Legislature cannot punish for a contempt committed in the Regular Session of the Legislature and cannot make his confinement dependent upon the Regular Session of the Legislature. The Special Session of the Legislature can only conduct business which is related to the Special Session of the Legislature. Under these circumstances, it would take a meeting of the Regular Session of the Legislature to punish the Petitioner for

any contempt committed against the Regular Session of the Legislature. This issue was raised by the Petitioner and the Petitioner asks the Court at this time to determine the jurisdictional merits of this argument.

The Court seems to say that the Assembly did not have the power to punish someone for contempt but has contempt powers for the sole purpose of protecting itself so that it can meet. The Petitioner maintains that there is no difference between a punishment and protection because the Petitioner remains in confinement in either case in violation of due process of law. However, assuming the correctness of the distinction made by the Wisconsin Supreme Court, there has been absolutely no showing anywhere that the Petitioner would disrupt the Assembly Chambers. The only opportunity which any Court of this State has had to determine whether there was any real threat of disruption of the Assembly by the Petitioner occurred in the case of *State ex rel. Warren v. Groppi*, Case No. 128-400, Circuit Court, Dane County. In that case, an extensive hearing was held before Judge Jackman to determine whether a temporary injunction should remain in force against the Petitioner. The State was unable to sustain its burden of proof that there was any threat to the Assembly or any other branch of State Government. As a result, the temporary injunction was quashed due to this lack of proof. A copy of Judge Jackman's opinion dated October 17, 1969, is attached to this brief. We ask the Court to take judicial notice of this judicial determination and all of the underlying facts and circumstances which were brought out at the hearing in that matter. That decision and that hearing disclosed that there is no justification for the Assembly Resolution of the Special Session

of the Legislature to confine the Petitioner because there is no threat to them that their proceedings will be interrupted in the future by the Petitioner. Viewed in this respect, it is clear that, since there is no legitimate fear, that the Assembly Resolution must be viewed as punishment and is therefore punishment meted out in violation of the Constitution.

At pages 12 and 13 of the Opinion, there is a suggestion that the Petitioner might have a right to some kind of a hearing on the merits of the contempt issue. We ask the Court to explain exactly what procedures might be available to the Petitioner to obtain a hearing since the Petitioner has been unable to find any Statutory authority to be tried on the merits of the contempt issue. In fact, the only authority found seems to preclude any hearing on the merits of a citation for contempt. In *State ex rel. Reynolds v. County Court*, 11 Wis. 2d 560, 573, the Court said:

"The power to punish for contempt is a vital and important power of the Courts and the Writ of Habeas Corpus cannot be used in such a way as to interfere with the Court's power and authority to administer the law. * * * In addition to sec. 292.21, Stats., no judge or court shall inquire into the legality or justice of an order committing for contempt. Sec. 292.22 (2). * * * The inquiry of the writ, of such writ is proper on the face of the pleadings, is restricted to the question of the jurisdiction of the committing court. Errors in the exercise of jurisdiction are not reviewable by this collateral remedy."

Thus, there does not appear to be any procedure by which the Petitioner can gain a trial on the merits of the con-

tempt issue. If such a procedure exists, the Petitioner requests the Court to explain what procedure is available to the Petitioner for a hearing on the merits and what rights are available to the Petitioner in any such hearing. Furthermore, the Petitioner at this time requests an appropriate hearing on the merits of the contempt issue.

Respectfully submitted,

JAMES E. GROPP, Petitioner

By PERCY JULIAN, JR., and
SHELLOW, SHELLOW
& COFFEY

ROBERT H. FRIEBERT

P. O. ADDRESS:

660 East Mason Street
Milwaukee, Wisconsin 53202

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN ex rel.

ROBERT W. WARREN, Attorney General,

*Plaintiff,**v.*JAMES E. GROPPi, and All Other
Persons Acting By, Through in
Concert With, or In His Behalf,*Defendants.*

Before: Hon. W. L. Jackman, Circuit Judge

Hearing on Temporary Injunction: October 6, 1969

Appearances:

Plaintiff by John C. Murphy,
Assistant Attorney General;Defendant Groppi by William Coffey,
James Shellow, and Percy Julian, Jr.

No other appearances.

* * *

It is undisputed in this case that on September 29, 1969, the named defendant, James E. Groppi, hereafter referred to as "defendant" was the instigator and leader of a mob that invaded the State Capitol, occupied the Assembly Chamber, and prevented the transaction by the Assembly of any business whatever until about 4 P.M., at which time, with extreme difficulty, the Speaker called the Special Session scheduled for 2 P.M., to order and then adjourned it. Because of the invasion and occupancy, by

the mob, of the Assembly Chamber and the conduct of defendant, the orderly processes of the Assembly were prevented. Members of the Assembly were, in some cases, unable to occupy their seats and in other instances did so with difficulty only after 4 P.M. The Speaker was prevented from performing any of his duties in the Assembly Chamber until 4 P.M., when business had been scheduled for 1:30 P.M. and 2 P.M. The mob, under the leadership of defendant, destroyed property, damaged the equipment and furniture, and was extremely disorderly. The defendant had control of the activities of the mob and it acted under his direction and leadership. Orderly conduct of business by the Assembly was effectively prevented on that day.

The complaint and affidavit attached in this case in substance recite most of the facts above stated, the balance having been supplied by testimony. No persons were made defendants by name except the named defendant, probably because their identities are not known. No appearance was made in this action, either in person or by attorneys for any persons except defendant.

Paragraph 10 of the complaint alleges that, in view of the overt acts of defendant and others, plaintiff "is informed and verily believes" that there is immediate danger that the conduct complained of will continue and that further demonstrations will interfere with operation of state government.

Although plaintiff was given the opportunity to make a showing of fact, there is no evidence in the record that since his arrest plaintiff has done any act of which indicates that he or anyone following his leadership intends

to interfere with the processes of government or to interfere with state property in the future. While there may well have been disorders, to which the court is not blind, there is no showing that there is any present and immediate threat to future operation of state government or to its property from any conduct by defendant or anyone at his direction or under his leadership.

Injunctive relief is prospective, not retrospective. The past is important only with regard to what it forbodes of the future. Relief must be based upon the prospect of conduct that will be unlawful.

It was said in *Gaertner v. Fond du Lac*, 34 Wis. 497: "In the first place the allegations in regard to the threatened action * * * are stated on information and belief. These matters should have been positively stated in the complaint, or otherwise proven, under the rule on this subject laid down in *Dinehart v. The Town of LaFayette*, 19 Wis. 677." See also *Quinn v. Havernor*, 118 Wis. 53.

This is an application for a temporary injunction and its purpose is to preserve the status quo and not to determine the ultimate disposition of the case. Although the allegation of threatened misconduct was on information and belief (and we have no criticism of such an allegation because it is but an opinion of what the future holds), we allowed plaintiff the opportunity to produce proof, from which an inference might be drawn of a threat, in order that the court might have the facts. There is evidence that defendant has no regrets for what he has done, but no evidence of threats to interfere with state government or property in the future nor any evidence that at present he has the capacity to either lead or counsel disorders.

See *Fromm & Sichel, Inc. v. Ray's Brookfield*, 33 Wis. 2d 98.

We are of the opinion that the plaintiff has not made a prima facie case that there is any immediate threat from defendant. This does not mean that while this case is pending there may not be such a threat at a later time and plaintiff is not precluded, by other determination of this motion, from renewing it if a threat to orderly government does appear in which defendant has a part.

It is therefore ORDERED: That plaintiff's motion for a temporary injunction is denied, without prejudice to plaintiff's right to renew the same if the present circumstances are altered to show a threat to orderly processes of government or interference with the orderly use of state property in which defendant Groppi has counseled, participated in or encouraged. The order dated September 30, 1969, insofar as it enjoins defendant, is vacated.

Dated October 17, 1969.

BY THE COURT:

W. L. JACKMAN
Judge

65a

Office of the Clerk
SUPREME COURT
State of Wisconsin

Madison, Dec. 19, 1969

To Shellow, Shellow & Coffey
Milwaukee

Sverre Tinglum, Asst. Atty. Gen.

Sir:—The Court today announced decision in your case
as follows:

St. 122 State ex rel. James E. Groppi v. Jack Leslie,
Sheriff of Dane County

Motion for rehearing denied without costs.

No opinion filed.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court

ORDER

(Caption Omitted)

In the briefs heretofore requested in this proceeding, counsel are requested to comment on the following statements contained in the opinion of the Supreme Court of Wisconsin entered October 17, 1969, in *Groppi v. Leslie*, State No. 122:

"We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27 the contemnor may be discharged before his time by 'the due course of law.' . . . We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence."

In particular, counsel are requested to comment on the nature of the judicial proceedings which may be available to one found by the legislature to have committed such a direct contempt, and the range of issues which he may raise in such judicial proceedings.

Entered this 20th day of October, 1969.

By the Court:

/s/ James E. Doyle

District Judge

**ENVELOPE CONTAINING PETITIONER'S
EXHIBITS A, B AND C**

(Caption Omitted)

ORIGINAL PETITIONER'S EXHIBITS A, B and C,
offered and received in evidence upon hearing held in the
above-entitled action at Madison, Wisconsin, on October 10,
1969.

/s/ John R. Adams

John R. Adams, Clerk.

PETITIONER'S EXHIBIT A

State No. 122

August Term, 1969

STATE OF WISCONSIN

IN SUPREME COURT

State of Wisconsin ex rel.

JAMES E. GROPPi,

Petitioner,

vs.

JACK LESLIE, Sheriff, Dane County,

Respondent.

The motion of the petitioner James E. Groppi for release from the custody of the respondent Jack Leslie, Sheriff of Dane County, Wisconsin, pending the deliberation of the merits of this case is denied.

Dated at Madison, Wisconsin, this 10th day of October, 1969.

By the Court:

Franklin W. Clarke,
Clerk.

PETITIONER'S EXHIBIT B

August Term, 1969

STATE OF WISCONSIN

IN SUPREME COURT

State of Wisconsin ex rel.

JAMES E. GROPPi,

Petitioner,

vs.

JACK LESLIE, Sheriff of Dane County,

Respondent.

PER CURIAM. The petitioner James E. Groppi on October 7, 1969, filed a petition for leave to commence an original action

in *habeas corpus*. The court waives oral argument and accepts original jurisdiction of the action for the writ of *habeas corpus* and in the interest of saving time and of expediting this cause, the court will consider the petition now on file as the complaint, granting leave to the petitioner to amend his petition as he may desire by 3:00 o'clock p.m. today, October 9th, 1969. Any amendment shall be served upon the Attorney General for the state of Wisconsin, who has represented the respondent in this matter before this court and has been served with the petition. The respondent shall answer the complaint by 9:00 o'clock a.m., tomorrow, October 10, 1969, and serve said answer upon the attorneys for the petitioner.

A hearing on the complaint and answer shall be held at 10:00 o'clock a.m., tomorrow, October 10, 1969, in the Supreme Court court room. The motion for bail is presently under reconsideration by this court upon the renewal motion of the petitioner for bail pursuant to this court's order of October 7, 1969.

PETITIONER'S EXHIBIT C

STATE OF WISCONSIN IN SUPREME COURT

STATE OF WISCONSIN, ex rel.
JAMES E. GROPP,

Petitioner,

v.

JACK LESLIE, Sheriff of Dane
County,

Respondent.

**RENEWED MOTION FOR BAIL AND FOR LEAVE
TO COMMENCE AN ORIGINAL ACTION IN
HABEAS CORPUS**

Petitioner, FATHER JAMES E. GROPPi, by his attorneys, renews his earlier motions for leave to commence an original action for habeas corpus in the Supreme Court of Wisconsin and for admission to bail pending the final determination of this matter or such other matters in connection therewith as may be heard by the Wisconsin Supreme Court.

Petitioner requests an immediate submission of this motion to the court for decision and stands upon the authorities heretofore presented to the court in oral argument and the original petition and motion herein.

Respectfully submitted,

JAMES E. GROPPi, Petitioner

By /s/ Percy L. Julian, Jr.

SHELLOW, SHELLOW and COFFEY

660 East Mason Street

Milwaukee, Wisconsin

PERCY L. JULIAN, JR.

330 East Wilson Street

Madison, Wisconsin

ATTORNEYS FOR PETITIONER

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970

SEPTEMBER SESSION, 1970

No. 18538

JAMES E. GROPPi,

Petitioner-Appellee,

vs.

JACK LESLIE, Sheriff of Dane
County,*Respondent-Appellant.*

} Appeal from the
 United States Dis-
 trict Court for the
 Western District
 of Wisconsin.

January 6, 1971

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, KILEY, CUMMINGS, KERNER, PELL and STEVENS, *Circuit Judges*.¹

PELL, *Circuit Judge*. This matter being before the court *en banc* following reargument pursuant to the granting of Groppi's petition for rehearing, we are not persuaded that the result, and reasoning in support thereof, reached by the panel originally hearing this appeal, as set forth in the court's decision of October 28, 1970, is other than correct.

The basic and simple issue remains whether the judicial power of summary punishment² for direct contempt is constitutionally exercisable by the legislative branch. We hold that it is for the reasons advanced in the original

¹ Thomas E. Fairchild, Circuit Judge, has disqualified himself, noting that he was a member of the three-judge court which decided *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970), a closely related case arising out of the same events as *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970), and heard at the same time.

² See *Ex parte Terry*, 128 U.S. 289 (1888).

opinion of this court, which opinion we now adopt and confirm. *Groppi v. Leslie*, F. 2d (7th Cir. October 28, 1970).

While the resolution adopted by the Wisconsin Assembly might well have spelled out the alleged misconduct of Groppi with greater particularity, it nevertheless is couched in terms of ultimate fact which we do not find lacking in adequate specificity. There is no indication to us that the contemnor failed to be fully and explicitly informed of the charge leveled against him and the exact nature of his misconduct.

Our decision is reached on the narrow issue before us, involving direct interference with "conducting public business" in "the immediate view of the legislative body." We do not purport to reach any decision on the matter of contemptuous behavior occurring outside the legislative chamber itself.

Other means for punishing contempts are available to the legislature and resort to such other procedures may be found sufficiently efficacious in the future. We here hold, however, that the basic public need for inviolability of the legislative processes of our government dictates the availability of the power of summary contempt punishment to the legislative branch. The Wisconsin legislature has seen fit in the circumstances of the case before it to exercise that power and we do not deem it in the public interest to interfere.

It is to be noted that Groppi's term of imprisonment under the resolution does not extend beyond the end of the legislative term, i.e., January 7, 1971. Both petitioner's and respondent's counsel have argued that the issue here involved is not mooted by this fact. This is our opinion also. See *United States ex rel. Lawrence v. Woods*, 432 F. 2d 1073, 1074-75 (7th Cir. 1970).

REVERSED.

STEVENS, *Circuit Judge*, with whom SWYGERT, *Chief Judge*, and KILEY, *Circuit Judge*, join, dissenting.

At no time in this proceeding has petitioner asserted any claim of innocence, or any claim that his sentence was excessive. It may be assumed, as the Wisconsin Supreme Court plainly stated, that any such claim would have been promptly and fairly heard in some form of post conviction trial.¹ As the disposition of an isolated controversy, therefore, no one could criticize this court's judgment as unfair or unreasonable.

The case, however, must be decided in the context of our legal traditions. It raises only a procedural issue, but in my judgment that issue is of fundamental importance and requires that petitioner's conviction be set aside. *Cf. Rex v. Justices of Bodmin* [1947] 1 K.B. 321.

The Fourteenth Amendment to the United States Constitution limits the procedures which a state may employ prior to the imprisonment of any person. The applicable clause states: "... nor shall any State deprive any person of life, liberty, or property, without due process of law." One of the oldest and most consistently accepted maxims in our legal tradition is the proposition that "no man shall be punished before he has had an opportunity of being heard." *The King v. Benn and Church*, 6 T.R. 198 (1795) (Lord Kenyon, Ch.J.); see *United States v. Galante*, 298 F.2d 72, 77 (2d Cir. 1962) (Friendly, J., dissenting).

The procedure which Wisconsin employed to deprive the petitioner of his liberty violated that ancient maxim. On October 1, 1969, without any prior notice to petitioner, and without giving him or his counsel an opportunity to be present or to be heard, the Wisconsin Assembly cited him for contempt, found him guilty of an offense which had been committed two days earlier, and sentenced him to imprisonment.² Although I recognize that the due process

¹ See *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 297 (1969).

² That legislative finding not only deprived petitioner of his liberty; it also had a material impact on his procedural rights. Even assuming the availability of a post conviction remedy in which petitioner could have presented evidence or argument denying the rather vague charge in the resolution, the legislative finding eliminated his presumption of innocence and shifted the burden of proof. It would have been necessary for him to go forward with the task of proving a negative before he

clause tolerates flexible procedures in varying situations,³ in my opinion the label "legislative contempt" does not exclude this *ex parte* conviction from the coverage of the Fourteenth Amendment.

Disorderly conduct on the floor of a legislative body is a well recognized species of legislative contempt.⁴ Historically acts of violence,⁵ like other legislative contempts such as attempted bribery,⁶ refusal to answer questions or pro-

³ (Continued)

heard the evidence against him. As a practical matter the value of his privilege against self-incrimination and of his right to be confronted with the witnesses against him would have been debased, if not destroyed entirely.

³ "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-163 (Frankfurter, J. concurring).

⁴ The Supreme Court decision which first upheld the power of Congress to punish contempts treated disorderly conduct in the presence of a legislative body as an established species of legislative contempt. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 217, 228; see *Marshall v. Gordon*, 243 U.S. 521, 543-544; Shull, *Legislative Contempt — An Auxiliary Power of Congress*, 8 Temp. L.Q. 198, 202-203 (1934).

⁵ In 1865, A. P. Field was reprimanded by the Speaker of the House and discharged from custody after a trial before a committee of the house at which he was found guilty of assaulting and wounding a member with a knife. Cong. Globe, 38th Cong., 2nd Sess. 991 (1865). In 1832, Sam Houston was arrested and tried before the House of Representatives for assaulting a member of the House, 8 Debates; 22nd Cong., 1st Sess. 2512-2620, 2810-3022. Perhaps the most famous instance of violence directed against a member of Congress occurred in 1856. Brooks, a member of the House of Representatives from South Carolina, who was offended by a speech, attacked Senator Charles Sumner in the Senate Chambers after adjournment, and beat him with a cane inflicting serious injuries. The Senate determined that the matter properly should be punished by the House, and a hearing was conducted by a Committee of the House which afforded Brooks the opportunity to appear and contest the evidence against him. H.R. Rep. No. 182, 34th Cong., 1st Sess. (1856).

⁶ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, apparently involved an attempt to bribe a member of the House. See 19 U.S. at 215; *Kilbourn v. Thompson*, 103 U.S. 168, 196. The contemnor was brought before the bar of the House and permitted to present a defense, 19 U.S. at 209-210. In 1795 Robert Randall was tried by the House on a charge of attempting to bribe a member and found guilty of contempt, 5 Annals, 4th Cong., 1st Sess. 166-195, 232, 200-229, 237, 243.

duce documents before a legislative committee,⁷ and the destruction of subpoenaed documents,⁸ have been prosecuted by the Legislature itself. In such cases the accused has been brought before the bar of the House and given an opportunity to speak in his own defense before any punishment was imposed. As this type of proceeding was no doubt somewhat cumbersome, and since the duration of any imprisonment was limited to the remainder of the legislative session, Congress long ago provided for the prosecution of contempts in judicial proceedings.⁹ Apparently Congress never considered the possibility of avoiding the inconvenience of a prolonged legislative hearing by simply eliminating the accused's traditional opportunity to be heard in his own defense.¹⁰

Prior to October 1, 1969, no American legislature had found it necessary to employ *ex parte* procedures to punish disorderly or other contemptuous conduct. The fact that the exercise of summary contempt powers has been accepted as a necessary and appropriate aspect of our judicial processes does not support an argument that the Wisconsin Legislature needs or possesses like powers. Indeed, a comparison of the legislative and judicial experience with contempts leads to a contrary conclusion.

It is the business of judges to decide particular cases, to make determinations of guilt or innocence, to listen to arguments in mitigation, and to impose appropriate punishments. Although occasional abuses have required correction on review, by and large the judicial contempt power has proved useful in advancing the orderly disposition of

⁷ *McGrain v. Daugherty*, 273 U.S. 135 (refusal to appear; apparently Daugherty was discharged from custody by a Federal District Court in Ohio before he could be brought before the bar of the Senate, 273 U.S. at 154); *Kilbourn v. Thompson*, 103 U.S. 168 (refusal to answer a question and produce documents; Kilbourn was brought before the bar of the House and allowed to present a defense, 103 U.S. at 174).

⁸ *Jurney v. MacCracken*, 294 U.S. 125 (destruction and removal of subpoenaed documents; MacCracken declined to appear before the bar of the Senate for trial, 294 U.S. at 143, 152).

⁹ 2 U.S.C. § 192 makes the refusal to testify before a committee of Congress a misdemeanor. The original provision, 11 Stat. 155, was enacted in 1857. See *Jurney v. MacCracken*, 294 U.S. 125, 151; see also *In re Chapman*, 166 U.S. 661. In recent years Congress has relied upon the statutory procedure. See Goldfarb, *The Contempt Power* (1963), 43.

¹⁰ Wisconsin's concern that a protracted hearing in this case might have required the legislative process to grind to a halt could, of course, have been eliminated by following the example of Congress.

litigation.¹¹ The conclusion that judges can safely be trusted with such powers is supported by analysis of the judicial function and by years of experience. The multitude of judicial contempt cases which have been decided in our history apparently include none in which a judge, two days after the offense, without giving the contemnor notice or any opportunity to be heard, entered an *ex parte* order sentencing him to prison.¹²

But that is the nature of the procedure employed by the Wisconsin Assembly in this case. This departure from tradition should itself point to the danger of entrusting summary contempt powers to bodies not accustomed to their exercise. The contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of government." *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8 (1897), and its exercise has been narrowly limited.¹³ Without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic

¹¹ "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 425-426 (Holmes, J. dissenting).

¹² The closest case I have found is *Ex parte Terry*, 128 U.S. 289, in which the contemnor, after being forcibly removed from the courtroom, was forthwith committed for contempt. In that case, however, the Court expressly reserved decision on the question whether a circuit court would have had the power on "a subsequent day" to proceed to order the arrest and imprisonment of the contemnor "without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, . . ." 128 U.S. at 314. In cases in which contempts during the course of a trial are not punished until the end of the proceeding, the contemnor is, of course, continuously present in court and normally given repeated opportunities to be heard in defense or mitigation before the imposition of sentence.

¹³ In *Anderson v. Dunn*, 19 (6 Wheat.) 204, 230, the Supreme Court stated that the legislative contempt power rests upon the principle of self-preservation and is limited to "the least possible power adequate to the end proposed." Cf., *Kielley v. Carson*, 13 Eng.Rep. 225, 234-235 (P.C. 1842).

than are judges.¹⁴ Therefore, history's recognition of a frequent need for summary punishment of judicial contempts does not establish a need for co-extensive legislative contempt powers.

It is argued that there was no risk of error or abuse in this case because petitioner's disorderly conduct occurred "in the immediate view of" the Wisconsin Assembly. It is contended that no purpose could have been served by hearing from petitioner or his counsel because the Assembly already knew all the facts. This may or may not be true. It is entirely possible that conduct which certain legislators found particularly offensive was committed by other members of the "gathering of people" led by petitioner;¹⁵ it is possible that some legislators were particularly offended by insulting speech (perhaps even speech on other occasions)¹⁶ rather than conduct; and that certain conduct was viewed by some legislators but not by others. Even if each member of the Assembly who voted in favor of the resolution had perfect knowledge of the facts, a valid purpose would have been served by hearing from petitioner before voting on the resolution. It is presumed that argument may persuade judges even when they know the facts.¹⁷ I would give legislators the benefit of the same presumption.¹⁸

¹⁴ In the Seventeenth Century a judge who insulted the privileges of the House by questioning its contempt powers was himself subject to contempt proceedings, in which his political unpopularity apparently affected the members' deliberations. See colloquy between the Attorney General and Lord Ellenborough, C.J. in *Burdett v. Abbott*, 104 Eng. Rep. 501, 540-543 (1811).

¹⁵ The opinion of the Wisconsin Supreme Court states that the Legislature could not perform its public duties without "imprisonment of the intruders," 44 Wis.2d at 291, yet the Assembly resolution related only to petitioner.

¹⁶ Legislative attempts to punish disrespectful speech as contempts have occurred in the past but have not met with judicial approval. See *Marshall v. Gordon*, 243 U.S. 521, 545-546.

¹⁷ In judicial proceedings in which there is no genuine dispute as to a material fact, and when only property rights are affected, the court may not enter a summary judgment without proper notice and argument. See Fed.R.Civ.P.56.

¹⁸ When the Assembly voted on the resolution, presumably the need for emergency action had passed. At that time, since the Wisconsin courts disapprove of punishment by the Legislature for past misconduct, an argument questioning the propriety of a legislative sentence of six months would not have been frivolous. 44 Wis.2d at 296.

It is suggested that even if summary legislative contempt powers have been unnecessary historically, the modern day "politics of confrontation" have created a new necessity that requires abandonment of traditional procedures. I question the validity of the argument, even if limited in application to plenary sessions of state legislative bodies, for prompt police action is probably an adequate means of terminating disorder and enabling the legislative body to resume its work. If the argument of necessity were valid, it would prove too much. Confrontations occur in legislative committee hearings, union meetings, stockholders meetings, public parks, college campuses, and the streets. Violent, disorderly conduct in all these settings should be firmly and promptly punished. I am not convinced that the effective administration of justice will be enhanced by using *ex parte* procedures to deal with any of these situations, or by providing an unusual protective procedure available only to legislative assemblies.

If punishment is to serve as an effective deterrent to repeated or widespread disorder, it is important that the community at large have confidence in the fairness of the proceedings which lead to conviction and sentencing.

"At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort in its enforcement to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis J. dissenting).

In my opinion the preservation of order in our communities will be best ensured by adherence to established and respected procedures. Resort to procedural expediency may facilitate an occasional conviction, but it may also make martyrs of common criminals.

I respectfully dissent.

KILEY, *Circuit Judge*, dissenting.

I join in Judge Stevens' dissent for the reasons he gives.

I dissent for the further reason that the Assembly Resolution does not state facts sufficient to support its conclusion that Groppi was guilty of disorderly conduct punishable as contempt. The effect upon Groppi of this fatal deficiency was denial of fundamental fairness because he is not informed of what he did in the "immediate view" of the Assembly which amounted to disorderly conduct.

Groppi's habeas petition does not expressly cast the deficiency in the Resolution as a denial of due process as we have done. His petition alleges denial of his "right to be informed of the nature and cause of the accusation against him." In this court Groppi argues persuasively the anomaly of a summary or direct contempt order reciting only a legal conclusion without a statement of the underlying facts supporting the conclusion. And he argues that "it is not clear" how a court can adequately review a contempt order unless the facts are stated.²

It is a fundamental rule that a judicial summary contempt order must carry, in itself, a statement of the acts or words constituting the contempt. This rule is implicit in *Ex parte Terry*, 128 U.S. 289, 305 (1888); and is stated in *Tauber v. Gordon*, 350 F.2d 843 (3rd Cir. 1965); *Parmelee Transportation Co. v. Keeshin*, 294 F.2d 310 (7th Cir. 1961); and *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950). In *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (7th Cir. 1969), where an NLRB hearing examiner excluded defendant's counsel from the hearing for "contumacious conduct," this court held that the exclusion violated defendant's due process rights, saying "[n]o compelling reason exists for not extending the requirement of adequate disclosure of the basis for contemptuous conduct findings to the quasi-judiciary as well as the judiciary." *Id.* at 379. Respondent-appellant's brief

¹ Groppi made similar allegations in his petition for habeas corpus in the state proceedings.

² The Wisconsin Supreme Court took judicial notice of facts not in the record. These "facts" are contained in footnote 2 in the majority opinion here.

concedes that legislative exercise of its summary contempt power parallels judicial exercise of that power, and I see no reason why the legislature should not be similarly required to state facts constituting the contempt.

Here the contempt resolution states that "Groppi led a gathering of people . . . which by its presence on the floor of the Assembly during a meeting . . . prevented the Assembly from conducting public business and performing its constitutional duty" and that the "above-cited action" constituted "disorderly conduct in the immediate view" of the Assembly, an offense under Sec. 13.26(1) (b) Wis. Stat. and Art. IV. Sec. 8 of the Wisconsin Constitution. According to the Resolution, anyone—however innocently—who leads a "gathering of people" on the Assembly floor is ipso facto guilty of contempt. There is no statement, for example, of what activities Groppi or the "gathering" engaged in, how they obtained admission to the floor of the Assembly, or how the Assembly was prevented from performing its constitutional functions. All of this is left to the speculation of the reviewing court.

A complaint for disorderly conduct drawn in words similar to the Resolution before us would not support a conviction. *People v. Mulvey*, 135 N.Y.S. 2d 17, 206 Misc. 771 (1954); *People v. Lee*, 334 Ill. App. 158, 78 N.E.2d 822 (1948); *State v. Hettrick*, 126 N.C. 977, 35 S.E. 125 (1900). An indictment, where the subject law is general, must descend to particulars. *Russell v. United States*, 369 U.S. 749, 765 (1962); *United States v. Cruikshank*, 92 U.S. 542, 548 (1875). See also *United States v. Carll*, 105 U.S. 611, 612 (1882). *A fortiori*, where a person is punished by imprisonment without being informed of what he did that was unlawful, he is denied fundamental fairness. No meaningful review would be available to him. See *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (7th Cir. 1969).

Because Groppi has not been informed in the Assembly Resolution what acts or words of his constituted disorderly conduct so as to be contemptuous, I would

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970

SEPTEMBER SESSION, 1970

No. 18538

JAMES E. GROPPi,

Petitioner-Appellee,

v.

JACK LESLIE, Sheriff of Dane
County,*Respondent-Appellant.*

} Appeal from the
 United States Dis-
 trict Court for the
 Western District
 of Wisconsin.

OCTOBER 28, 1970

Before HASTINGS, *Senior Circuit Judge*, CUMMINGS and
 PELL, *Circuit Judges*.

PELL, *Circuit Judge*. On October 1, 1969, the Assembly,
 one of two houses of the Wisconsin state legislature,
 adopted the following resolution:

"Citing James E. Groppi for contempt of the
 Assembly and directing his commitment to the Dane
 county jail.

"In that James E. Groppi led a gathering of
 people on September 29, 1969, which by its presence
 on the floor of the Assembly during a meeting of the
 1969 regular session of the Wisconsin Legislature
 in violation of Assembly Rule 10 prevented the
 Assembly from conducting public business and per-
 forming its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom."

Subsequent to the adoption of the Assembly resolution, a copy was served upon Groppi and he was imprisoned in the Dane County Jail upon the authority of said resolution. Prior to being served with a copy of the resolution, Groppi was given no specification of the charge against him, had no notice of any kind, nor was any hearing of any kind held. An application for a writ of habeas corpus was dismissed by the Circuit Court for Dane County and thereafter the Wisconsin Supreme Court also denied an application for a writ of habeas corpus and denied a motion for rehearing. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969).

On the same day that the Dane County Circuit Court denied Groppi's petition, a petition for a writ of habeas

corpus was filed in the United States District Court for the Western District of Wisconsin. Groppi was admitted to bail by the district court on the day the Wisconsin Supreme Court denied his petition but after he had served ten days of the sentence imposed by the Wisconsin Assembly. On April 8, 1970 the district court held that the legislature could not summarily impose jail sentence for contempt of the legislature without providing the accused with some minimal opportunity to appear and to respond to the charge. The court accordingly granted the writ of habeas corpus, dismissed the respondent Leslie's motion to dismiss, vacated the order releasing Groppi on bail and ordered that he be released from any further custody or restraint pursuant to the resolution of the Assembly. *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

Simultaneously a three-judge district court held constitutional that portion of the Wisconsin Statutes providing for further prosecution after the adjournment of the legislature, being §13.27(2), Wis. Stat. *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970).

An exposition of the development of our law on the power of not only courts but legislatures to punish for contempt is to be found in both the decision of the Wisconsin Supreme Court and of the single-judge district court¹ and no worthwhile purpose will be served by burdening this opinion with a repetition thereof. Suffice it to say that the law as it presently exists² is that the legislature as well as the court has the power to punish for contempt and further that where all of the essential elements of the misconduct are under the eye of the court and are actually observed by the court, the judge has the power to impose punishment summarily. The sole issue now before us on this appeal is as stated in the brief filed on behalf of Groppi: "Should the summary power of contempt to imprison a person without a notice or hearing be extended to a legislature."

The district court concluded "that such punishment may not be imposed by a legislature without at least

¹State ex rel. *Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969); and *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

providing the accused with some minimal opportunity to appear and to respond to a charge." (311 F. Supp. at p. 777). We disagree.

Groppi contends that there is no historical precedent for the exercise of summary contempt power by the legislature. Insofar as reported court decisions are concerned the contention appears to be correct. Conversely, we have found no reported decisions holding that the legislature does not have summary contempt power. The fact of this apparent lack of authority either way suggests that instances of leading a gathering of people on to the floor of legislative halls and preventing the legislature from conducting public business are extremely rare if not virtually non-existent to this time in the United States.

Groppi further contends that our legislatures have apparently not needed summary contempt powers as they have functioned to date without that power. This assertion rather begs the question as it is not possible to tell whether they have functioned without the power if the need has not heretofore arisen for the use of the power. Whether the legislature does have the power is the issue before us. Whether legislatures in the future will have the need for summary contempt power may well be a *sequela* of the ultimate decision in the case before us.

We cannot be unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country and this appeal, presenting, as it appears to do, a case of first impression, assumes in our judgment critically significant proportions as to the ability of deliberative legislative bodies to carry on their governmental functions.

While it might be difficult to equate with any degree of equanimity orderly governmental procedures with the effect of the conduct of Groppi as stated in the opinion of the Wisconsin Supreme Court,² and while the taking of

² "On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protesters into the state capitol building and proceeded to 'take over' the Assembly chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legis-

the law into one's own hands, no matter how worthy the cause might be, is arguably an insecure basis from which to complain of swift and summary punishment, nevertheless, putting aside these considerations we determine the question here involved as a legal issue in a constitutional context. For the purposes of this appeal we are considering only the bare allegations of the Assembly resolution that Groppi led a gathering of people on the floor of the Assembly during a session thereof and prevented the Assembly from conducting a public business. It is on this factual basis we hold that the legislature may properly punish summarily for contempt.

It must also be borne in mind that we have here involved not mere words of incitation but rather deeds and acts of actual physical force.

The court below was of the opinion that the minimal requirements of procedural due process could be provided by the legislature with little delay, presumably referring to a legislative hearing. However, the invasion here involved is not of a committee or subcommittee of the legislature but of the legislative hall itself. Again, we cannot be unmindful of the protracted nature of court proceedings which involve a *cause célèbre*. The courts, notwithstanding occasional difficulties, are essentially designed to devote the necessary time. The legislature is not. Counsel for Groppi conceded during the argument on this appeal that conceivably a full legislative hearing could cause the work of the body to grind to a halt for several weeks. We find such a contemplation intolerable on the American scene.

We agree with that part of the decision of the district court (311 F. Supp. at 780) which disagreed with the

² (Continued)

lative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight." *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192, 194 (1969).

declination of the Supreme Court of Wisconsin³ to draw an analogy between courts and legislatures with respect to the power to punish direct contempt. If the only purpose of the summary contempt power was to remove from the legislative halls persons obstructing legislative activity, this no doubt could be ordinarily expeditiously accomplished by summoning the necessary police. The district court recognized that legislatures do impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. This is, in our opinion, as it should be. While we recognize that there is some disagreement as to the extent to which punishment is a crime deterrent, we are yet to be convinced that freedom from immediate and summary punishment would be any deterrent to proscribed activities.

In the opinion from which this appeal is taken, the district court adverted (at p. 777) to the possibility of a destruction of the parallel of the legislative situation to the court's summary powers because of the question whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1 and were "actually observed by those members." In view of the fact that regularly constituted legislative sessions are frequently marked by substantially less than a full attendance on the "floor" by all members of the body, it may be arguable whether the strict standards enunciated in *In re Oliver*, 333 U.S. 257, 274-75 (1948),⁴ need be scrupulously observed or whether it may not be adequate that proceedings were disrupted for those who were in the chamber at the time, that no further proceedings could be had during the continuance of the invasion and that the resolution of punishment be adopted by at least a majority of the body as a whole irrespective of whether each individual member there personally observed the misconduct. We do not

³ 44 Wis. 2d at 296, 171 N.W. 2d at 198.

⁴ "[F]or a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but * * * the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct."

need to determine this issue. The question of fact of whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later was not timely presented to the state courts of Wisconsin and it would therefore appear that there had not been an exhaustion of remedies available in the courts of this state. 28 U.S.C. §2254. Further, there is no allegation which would serve to create an issue of fact included in the petition filed in the district court. The issue appears to have been created by the district court's opinion. We do not on this appeal deem it necessary to indulge in a presumption of non-regularity of the Assembly proceedings. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929).

The district court in its opinion, while expressing some skepticism (at p. 778) as to the viability, or at least desirability, of the doctrine of summary contempt power insofar as the courts are concerned, nevertheless, accepting the court situation as established law, found a basis for differentiating the factual situation presented on the one hand in the courtroom and on the other hand in the legislative chambers. Thus the court felt that the physical contours of most legislative chambers, the comings and goings of the members and the diffusion of attention of the members among other factors would render it improbable that all the members present would share a uniform perception and evaluation of the incident as would the single judge. The court's conclusion was that the room for error inherent in the response of a large group was so great as to require that it observe some minimal procedures before it invoked its contempt power. However, the matter is not before us on the factual basis of perceptivity of witnesses. It is before us on the basis that James E. Groppi led a gathering of people onto the floor of the Assembly and prevented the Assembly from conducting its business. The Wisconsin Supreme Court made it clear in its decision that factual matters such as erroneous perceptivity would be subject to review in the courts of that state. (171 N.W. 2d at p. 198). The court pointed out that Groppi had not sought a hearing in the Wisconsin Supreme Court or any court

on the merits of the contempt issue, and that he had not offered any defense nor denied that his acts amounted to a contempt, although the court had allowed him to amend his complaint to present any matter he wished.

As a matter of fact, there is a complete absence in the record before us in the proceedings in the federal district court and in this court on appeal of any denial by Groppi of the contemptuous acts with which he was charged. The sole contention of Groppi is simply that he should not have been summarily punished for the charged contemptuous acts.

To the extent that Groppi appears to be urging a jury trial pursuant to *Bloom v. Illinois*, 391 U.S. 194 (1968), we do not find *Bloom* applicable here as the punishment provided for in the resolution could not in any event have exceeded six months. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), *Dunkin v. Louisiana*, 391 U.S. 145, 162 n. 35 (1968).

Insofar as Groppi contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties, we agree with the district court on the invalidity of this contention and adopt and approve that portion of the district court's opinion.

The district court in its opinion also expresses the thought that unlike many courts of record, frequently, if not typically, no verbatim written record of legislative proceedings exists. Acts of violent disruption, such as those which have occurred recently in the state courts of California, would seem scarcely to lend themselves to a reporter's transcript any better than would the acts charged against Groppi in the resolution of the Wisconsin Assembly. In any event, a question of what happened factually and whether it is to be determined from a court reporter's transcript or from the mouths of eye witnesses is one which is not determinative of the issue before us. The proof of what happened in the legislative halls will be the same whether the legislature has to have a hearing prior to punishment or whether the hearing is in a court for a review of a claim of lack of factual basis for the punishment.

We share the laudable concern of the district court for the full protection of procedural rights guaranteed to the individual by the due process clause of the Fourteenth Amendment. In essence, however, we have in the case before us a situation in which we must balance claimed constitutional procedural rights of the individual citizen against the welfare of the citizenry as a whole. We find the scales weighted in favor of the citizenry. In so doing we do not feel we are adopting an alarmist view in recognizing validity in the respondent's position that protracted and frequent legislative trials, if necessary, could easily and realistically become a favorite tool in the politics of confrontation and obstruction, and representative government (whatever its present faults) would go down to defeat.

We reach with some reluctance any decision which appears even remotely to achieve an eroding effect on basic civil liberties as guaranteed by our constitution; but believing, as we do, that illegal and physically forcible interference with properly functioning governmental institutions would pose the real risk of being eventually accompanied by the abolition, rather than the erosion, of the individual constitutional liberties, we are unable to reach any other result in the case before us.

For the reasons hereinbefore indicated, the judgment of the district court is reversed, the petition for habeas corpus is hereby denied and respondent-appellant's motion to dismiss is hereby granted.

REVERSED.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

OCTOBER TERM, 1970, FEBRUARY 17, 1971

Civil Action File No. 69-C-241 (H-C)

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

JUDGMENT

This action came on for hearing before the Court, the Honorable JAMES E. DOYLE, United States District Judge, presiding, upon the Mandate of the United States District Court for the Seventh Judicial Circuit, entered on the 11th day of February, 1971, and filed herein on the 17th day of February, 1971; and the Court having entered its Direction to Enter Judgment herein pursuant to said Mandate:

IT IS ORDERED AND ADJUDGED: That the petitioner's petition for a writ of habeas corpus be and it hereby is denied; that respondent's motion to dismiss the petition be and it hereby is granted; that said petition for a

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writ of habeas corpus be and it hereby is dismissed; and that costs be taxed in favor of respondent and against petitioner.

Dated at Madison, Wisconsin, this 17th day of February, 1971.

(s) JOHN R. ADAMS
Clerk of Court

A TRUE COPY, Certified this 17th day of February, 1971.

JOHN R. ADAMS, Clerk

By John R. Adams
Clerk

OPINION AND ORDER
(Caption Omitted)

This is a petition for habeas corpus in which it is alleged that petitioner is in custody in violation of the Constitution of the United States. 28 U.S.C. § 2241(c) (3). A response has been filed. Petitioner has been admitted to bail pending a decision on his petition.

Findings

Upon the basis of the entire record, I find:

On October 1, 1969, the Assembly, one of two houses of the Wisconsin state legislature, passed the following resolution (entitled "1969 Spec. Sess. Assembly Resolution"):

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

A copy of the Assembly resolution was subsequently served upon petitioner and he was imprisoned in the Dane

County jail upon the authority of the said resolution. Prior to being served with a copy of the resolution and imprisoned, petitioner was afforded no specification of the charge against him, no notice of any kind, and no hearing of any kind. Thereafter, petitioner unsuccessfully sought to obtain his release by commencing various actions and proceedings in the state courts and in this court. The Circuit Court for Dane County dismissed petitioner's application for a writ of habeas corpus. The Wisconsin Supreme Court thereafter denied petitioner's application for a writ of habeas corpus, and denied a motion for rehearing. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282 (1969).

Wisconsin Constitution and Statutes

Article IV, Section 8, Wisconsin Constitution, provides, in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior"

Section 13.26, Wisconsin Statutes, provides, in part: .

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . . :

"

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27, Wisconsin Statutes, provides:

"(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county

jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail."

Contentions of Parties

The petition for habeas corpus asserts that respondent sheriff's custody of petitioner pursuant to the Assembly resolution is unlawful because:

"petitioner has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges."

The petition further asserts that the Assembly action constitutes "a bill of attainder and/or pains and punishments"; that the Assembly resolution is invalid because the Assembly was not legally in either regular or special session either on the date of the alleged offense or on the date the resolution was passed; and that the remedies available to petitioner in the state courts are ineffective and inadequate to protect petitioner's rights.^{1/}

^{1/} Subsequent to the filing of the petition for habeas corpus in this proceeding in this court, the Supreme Court of Wisconsin denied a petition for habeas corpus. It is conceded that petitioner has now exhausted his state remedies with respect to those issues raised by his petition in the Wisconsin Supreme Court and those issues acted upon by that Court. 28 U.S.C. § 2254.

The respondent denies that petitioner's detention violates the Constitution of the United States, and moves to dismiss because the petition fails to state a claim upon which relief can be granted. No evidentiary hearing has been held. A hearing on issues of law has been held in this habeas corpus proceeding in conjunction with a hearing in a related three-judge case, *Groppi v. Froehlich*, 69-C-235.

Procedural due process

In *Ex parte Terry*, 128 U.S. 289, 313 (1888), this broad statement of the courts' contempt power appears:

We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.

This power in the courts has been reaffirmed frequently. *United States v. Barnett*, 376 U.S. 681, at 698 (1964); *In re Murchison*, 349 U.S. 133, 134 (1955); *Sacher v. United States*, 343 U.S. 1, at 8 (1952); *Fisher v. Pace*, 336 U.S. 155 (1949); *Cooke v. United States*, 267 U.S. 517, 534-535 (1925); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Savin*, 131 U.S. 267, 277 (1889). See Rule 42 (a), Federal Rules of Crim. Proc.; 18 U.S.C. §§ 401, 402.

Commenting upon *Ex parte Terry* 60 years later, the Court emphasized that it had "recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of court-disrupting misconduct which alone justified its exercise." *In re Oliver*, 333 U.S. 257, 274 (1948). The Court continued (333 U.S. 274-276):

That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States*, 267 U.S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 536.

Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way

of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, that the accused be accorded notice and a fair hearing as above set out.

In *Holt v. Virginia*, 381 U.S. 131 (1965), *Offutt v. United States*, 348 U.S. 11 (1954), and *Cooke v. United States*, 267 U.S. 517 (1925), the Court has demonstrated how narrowly circumscribed is the area in which summary power may be exercised by a court.^{2/}

I turn to the subject of contempt of a legislative body. That agreeably to the Constitution of the United States a legislative house (hereinafter "legislature") may impose a jail sentence for contempt of the legislature is long established and has been reaffirmed in modern times. *Jurney v. MacCracken*, 294 U.S. 125 (1935).^{3/} However, in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 208 (1821), *Kilbourn v. Thompson*, 103 U.S. 168, 173 (1880), *Marshall v. Gordon*, 243 U.S. 521, 532 (1917), *McGrain v. Daugherty*, 273 U.S. 135, 153 (1927), and *Jurney v.*

^{2/} Oklahoma has required, by its Constitution, Art. 2, § 25, that an opportunity to be heard must always precede imposition of a penalty or punishment for contempt. This requirement applies even to contemptuous conduct in the immediate view of the judge. *Sullivan v. State*, 419 P. 2d 559 (Okla. Ct. of Crim. App. 1966); *Young v. State*, 275 P. 2d 358 (Okla. Ct. of Crim. App. 1954).

^{3/} I consider hereinafter this petitioner's contention that the Assembly resolution under which he is confined is a bill of attainder or a bill of pains and penalties.

MacCracken, supra, at 144, before being cited for contempt, the accused had been brought before the House or Senate to answer the charge or to purge himself. I am aware of no decision of the Supreme Court of the United States or of the Court of Appeals for this circuit in a case in which the contumacious behavior was said to have been disorderly conduct in the immediate view of the legislature and directly tending to interrupt its proceedings, nor any in which the legislature undertook to impose punishment summarily. I consider the question raised here to be an open question.

The petitioner has neither denied nor admitted in this court that he engaged in the conduct described in the Assembly resolution: namely, that he led a gathering of people which by its presence on the floor of the Assembly prevented the Assembly from conducting public business and performing its constitutional duty.⁴⁷ The Supreme Court of Wisconsin has concluded, implicitly if not explicitly, that such conduct violates Sec. 13.26, Wis. Stat., which prohibits "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings"; this construction of the state statute is binding on

⁴⁷ Whether the Assembly was in regular session or special session on the date of the alleged offense or on the date the contempt resolution was passed is a matter of state law. In a habeas corpus proceeding here, petitioner may challenge the lawfulness of his custody only on the ground that it is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (c) (3). *United States ex rel. Greer v. Pate*, 393 F. 2d 44 (7th cir. 1968), cert. den. 393 U.S. 890 (1968).

me.^{5/} I conclude that if such conduct had occurred in a courtroom in the presence of a judge, "where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court" (*In re Oliver*, 333 U.S. at 275), the judge would have been empowered to impose a jail sentence summarily. The precise question is whether such conduct in a legislative chamber may be punished summarily by a legislature by confinement in jail.^{6/} I conclude that such punishment may not be imposed by a legislature without at least providing the accused with some minimal opportunity to appear and to respond to a charge.

The Assembly resolution passed October 1 recites that petitioner engaged in certain acts September 29. The question arises whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1, and were "actually observed" by those members. If not, the parallel to the court's summary powers is destroyed. It is a question of fact whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later. How this issue of fact is to be resolved presents a problem. The text of the October 1 resolution is

^{5/} In its opinion, the Supreme Court of Wisconsin, apparently by an exercise of judicial notice, referred to numerous events and circumstances which were said to have occurred in and around the State Capitol September 29 and thereafter. No evidentiary hearing had been held by that Court, or at its direction, and none has been held in this court. So far as the events of September 29 in the Assembly chamber are concerned, the only version of the facts is that contained in the Assembly Resolution of October 1. Obviously, the incident and its aftermath were abundantly reported by the news media. It may appear precious for a court to refrain from accepting accounts of such an incident which are generally accepted by the public. For some purposes, it may be practical for a court to accept them. For example, it should not be necessary for a court to receive evidence that extensive rioting had occurred in a community prior to the particular events involved in a case. But the central issue in this case is whether, in circumstances such as these, a specific person who is said by the press, radio, or television to have engaged in certain specific acts may be imprisoned without those minimal procedures necessary to insure against mistaken impressions.

^{6/} Clearly, so far as the Constitution of the United States is concerned, the legislature, or members or officers or agents thereof, are free to remove from the house one engaging in such conduct and for a reasonable time to bar him from reentering. The issue here relates to imposing a term in jail.

silent on the point, and the record in this court sheds no light on it.⁷⁷ To impose the burden of proof upon the petitioner would be unreasonable; it would probably require him to take a discovery deposition of each member of the house (or at least of a number of those voting affirmatively October 1 which number would constitute a majority of those present and voting). When there is involved a power so extreme that its use by a court has been limited with intense care, the validity of its use by a legislature may not be made to depend upon a presumption of fact concerning whether the September 29 acts were observed by the October 1 voters.

However, even if the Assembly record itself or evidence presented in a court later, were to establish that there were present in the Assembly chamber September 29 a sufficient number of those members voting affirmatively October 1, I would conclude that the due process clause of the Fourteenth Amendment would forbid these members to impose a jail term upon the accused without first providing him with a reasonable opportunity to respond to a stated charge.

In my view, it is an anachronism that a judge should be permitted today to impose a jail term upon a contemnor without first providing him with a reasonable opportunity to respond to a stated charge. The doctrine with respect to courts is of ancient origin. Even in its present restricted and battered state, it is an unseemly aberration in a mosaic of procedural rights guaranteed by the due process clauses of Fifth and Fourteenth Amendments in many less compelling situations. But the doctrine does enjoy some slender roots in practical common experience. That is, when by the exercise of his own senses, the judge is a witness to the totality of the incident - the time at

⁷⁷ Compare Rule 42 (a), Federal Rules of Criminal Procedure: "A criminal contempt may be punished summarily if a judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

which it occurred, the place at which it occurred, the immediate history of the situation in which it occurred - it is not wholly unreasonable to conclude that the room for error in his perception and evaluation of the incident is slight and that intermediate procedures may be dispensed with. Practical common experience affords no such support for a similar conclusion with respect to the room for error in perception and evaluation by a large group of human beings, whether judges, legislators, or others. The physical contours of most legislative chambers, the comings and goings of the members, and the diffusion of attention of the members, among many factors, render it improbable that all of the members present would share a uniform perception and evaluation of an incident, upon the basis of which each member might then decide upon an appropriate response. This would be true even at a moment when the legislature is actively in session, discussing the business before it, and more true at times at which it is commencing or terminating its work. The question is not whether these attributes of a legislature altogether prevent it from imposing a jail sentence upon a contemnor. The question is whether these attributes so distinguish a legislature from a court that the legislature must be prevented from visiting such punishment upon a contemnor with such swiftness and abruptness. I conclude that the room for error inherent in the response of a large group is so great as to require that it observe some minimal procedures before it invokes this power.^{8/}

There are other reasons which lead me to this conclusion.

Unlike many courts of record, frequently if not typically no verbatim written record of legislative proceedings exists. If the availability of judicial review of the contempt citation is

^{8/} Perhaps similar considerations may affect the summary powers of courts consisting of more than one judge. However this may be, there remains a significant contrast between a court consisting of nine members, and the Wisconsin Assembly consisting of one hundred.

assumed, it would nevertheless be severely crippled by the absence of a definitive record of the incident.

Moreover, the nature of available judicial review is extremely unclear. In its opinion in the present case, the Supreme Court of Wisconsin stated (44 Wis. 2d at 297):

We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27, Stats., the contemnor may be discharged before his time by "the due course of law." The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense. We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence.

And the court stated further (at 299):

The only practical way a contempt in the presence of the legislature can be handled is by summary process reviewable by the judiciary. We think it is neither a necessary nor an acceptable construction of the constitution that a trial or a hearing be engrafted upon the legislative contempt power when the judiciary will immediately review the action of the legislature and has the power to grant adequate and appropriate relief.

Although this statement is somewhat surprising in the light of the limitations upon the historic function of the writ of habeas corpus,^{9/} I am bound to accept it as an authoritative statement that one who has been imprisoned by the legislature for contempt of the legislature may obtain from a Wisconsin court a review of the "merits" of the legislative action. However, the nature and extent of this review is not explained. It is not clear whether the accused is entitled to a trial *de novo* on the underlying factual issues relating to his conduct, or whether the review is comparable to judicial review of an administrative decision, or whether the burden of persuasion rests with the accused petitioner or with the respondent. If there is indeed to be a review of the "merits", it appears that a trial of the facts would be necessary, since no trial has as yet occurred, and since there is no written record of the underlying events to which a court might look. Assuming, however, that these difficult matters could be resolved satisfactorily, the initial injustice would not be reached; the hearing, whatever it may be, would be afforded after the imposition of the punishment and not before.^{10/}

I do not consider that affording petitioner some minimal opportunity to appear and to respond to a charge would constitute an undue burden on the legislature. The proceeding would

^{9/} In *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), in a habeas corpus proceeding to test the lawfulness of a confinement imposed by the Assembly, the Court stated (at *639) that it had no appellate power over the Assembly when the Assembly had acted within its jurisdiction, and that the Court could not "suspend [the Assembly's] judgment because it has made a mistake or abused its discretion in the premises." In *State ex rel. Reynolds v. County Court*, 11 Wis. (2d) 560, 573 (1960), it was emphasized that in Wisconsin, even with respect to contempt of court, habeas corpus is "restricted to the question of the jurisdiction of the committing court" and that errors "in the exercise of jurisdiction" are not reviewable. See 39 Am. Jur. 2d, Habeas Corpus, § 28, pp. 198-201.

^{10/} Bail was refused to this petitioner both by the Circuit Court for Dane County and the Supreme Court of Wisconsin. In an appeal from a conviction for contempt of court, sentence may be stayed and bail granted. *Sacher v. United States*, 343 U.S. 1, 12-13 (1962). On the other hand, bail is rarely granted in habeas corpus proceedings. *United States ex rel. Epton v. Nenna*, 281 F. Supp. 388 (S.D.N.Y. 1968).

probably resemble the contempt proceedings in the United States Congress discussed in *Kilbourn v. Thompson* and *Jurney v. MacCracken*, *supra*, in which the accused was ordered to appear before the bar of the House or Senate and to show cause why he should not be punished for contempt.¹¹

In its opinion denying habeas corpus to this petitioner, the Supreme Court of Wisconsin expressly declined to draw an analogy between courts and legislatures with respect to the power to punish direct contempt. 44 Wis. 2d at 295. The Court summarized the distinction between the two powers as follows (at 296):

Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is punishment necessary to maintain the dignity, decorum, and respect for the court. This objective admittedly is also found in punishment for some crimes. In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body.

Whatever the validity of this view in terms of the sources and early history of the contempt power, or in terms of justifications for its existence, I cannot agree that it accurately describes the uses of the power. On the one hand, courts impose

¹¹The report of *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), involving a contempt of the Wisconsin legislature, reveals (at *633-634) that the alleged contemnor was arrested on February 9, "arraigned before the said Assembly" on February 10, that the Assembly "thereupon" declared him to be in contempt, that he prayed to be heard by counsel in answer (which was refused), that he gave an answer in writing ("which the Assembly declared by resolution to be insufficient"), and that on February 11 the Assembly resolved that he was to be confined for ten days.

sanctions for contempt for the purpose of preventing further interference with their function, as well as for the purpose of punishing the offender for a completed act. For example, in *Fisher v. Pace*, 336 U.S. 155 (1949), the trial judge interrupted a lawyer who had persisted in making improper argument to the jury, and ordered him to be removed immediately from the courtroom and placed in jail. Indeed, in *Sacher v. United States*, 343 U.S. 1, 10 (1952), in discussing whether a court might summarily punish a lawyer during a trial or await the trial's end, the Court said that "[t]he overriding consideration is the integrity and efficiency of the trial process" On the other hand, legislatures impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. In *In re Falvey and Kilbourn*, 7 Wis. *630, 634 (1858), the Assembly sentenced the contemnor to jail for ten days "as punishment for the contempt . . . in failing to appear before the joint investigating committee." In *Jurney v. MacCracken*, 294 U.S. 125, 147-150 (1935), it was pointedly held that a legislature may impose punishment for contempt solely as punishment, after the legislative obstruction has been removed, or after the removal of the obstruction has become impossible. Moreover, in the present case, the resolution was adopted by the legislature two days after the acts complained of, and without a hearing even for the purpose of determining how long a period of confinement would be necessary to prevent the petitioner from causing further obstruction of the legislative function.

For the reasons stated, I conclude that the petitioner has been denied procedural rights guaranteed him by the due process clause of the Fourteenth Amendment, and that he is entitled to the relief he seeks.

Bill of Attainder

Petitioner contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties. Art. I, § 10, clause 1, of the Constitution provides: "No State shall . . . pass any Bill of Attainder. . . ." A bill of attainder is a legislative act sentencing a person to death for an alleged crime without a judicial trial, while a bill of pains and penalties imposes some milder punishment. Both types are included in the constitutional prohibition on bills of attainder. Black's Law Dictionary 162 (4th ed. 1951).

In view of the conclusion I have reached, that petitioner is entitled to be released because he has been denied procedural due process, it is not strictly necessary to consider his contention with respect to attainder. However, if his contention in this respect were to be upheld, it might be that the legislature would be wholly deprived of power to impose punishment upon a contemnor, with or without due process. To make clear that I intend no such consequence, I add these comments.

There is some similarity between bills of attainder, which constitute punishment by a legislature without judicial safeguards, and legislative contempt judgments, which can also constitute punishment by a legislature without most judicial safeguards. However, the legislative contempt power has a long history, has been upheld numerous times during that history, *Jurney v. MacCracken*, *supra*, 294 U.S. at 148-150, and has never been limited or denied because it allegedly violates the constitutional prohibition against bills of attainder. The bill of attainder defense to legislative contempt citations "has not been seriously accepted by the Supreme Court, though Justices Black and Douglas have consistently raised the point in dissent." R. Goldfarb, *The Contempt Power* 223 (1963). See

Barenblatt v. United States, 360 U.S. 109, 153 *et seq.* (1959) (dissenting opinion).

I conclude that the prohibition on bills of attainder, on the one hand, and the legislative contempt power, on the other, have been permitted by the Supreme Court of the United States to co-exist for so many years that I am not free now to hold that the survival of the first demands the extinction of the second.

Right to a jury trial

The petition here does not assert specifically that custody is unlawful because petitioner was deprived of a jury trial. However, it does allege that he was denied the right to a trial or hearing of any kind; the right to a jury trial was asserted in oral argument; and the Supreme Court of Wisconsin expressly considered whether petitioner had been entitled to a jury trial and decided that he had not. 44 Wis. 2d at 298-299. I consider that petitioner has exhausted his state remedy with respect to the jury trial issue, and that he has sufficiently asserted it here. However, I express no opinion with respect to the merits of this contention.

I have concluded that in every case of contempt of the legislature, certain minimal requirements of procedural due process must be observed before the contemnor may be imprisoned. I do not consider these limitations upon the legislature oppressive. First, the minimal requirements of procedural due process can readily be provided with little delay. Second, the ability of the legislature to protect its proceedings from disruption lies primarily in its undoubted power to expel any disrupter immediately, and to employ appropriate police action to prevent further disruption.

ORDER

For the reasons stated above, and on the basis of the entire record herein, the petition for habeas corpus is hereby granted and respondent's motion to dismiss is hereby denied. The order of October 11, 1969, releasing petitioner on bail is vacated, and it is hereby ordered that petitioner be released from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969.

Entered this 8th day of April, 1970.

By the Court:

/s/ James E. Doyle

District Judge

NOTICE OF APPEAL

(Caption Omitted)

Notice is hereby given that the respondent above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order granting a writ of habeas corpus to petitioner, which order was entered in this action on the 8th day of April, 1970.

ROBERT W. WARREN

Attorney General

DAVID J. HANSON

Assistant Attorney General

/s/ Sverre O. Tinglum

SVERRE O. TINGLUM

Assistant Attorney General

Attorneys for Respondent

Post Office Address:

State Capitol

Madison, Wisconsin 53702

OPINION OF WISCONSIN SUPREME COURT

44 Wis. 2d 282

STATE of Wisconsin ex rel. James E.
GROPPI, Petitioner,

v.

Jack LESLIE, Sheriff of Dane County,
Respondent.

No. State 122.

Supreme Court of Wisconsin.

Oct. 17, 1969.

Rehearing Denied Dec. 19, 1969.

Original action for writ of habeas corpus for release of protester imprisoned by resolution of the assembly for contempt committed in its presence. The Supreme Court held that where the protester did not deny the contempt or offer any defense, and the court were open to determine promptly any question on the merits of contempt found to have been committed by summary process before the legislature for contempt committed in its presence, due process was satisfied.

Petition denied.

1. Evidence

In proceeding upon application to state supreme court for writ of habeas corpus for lease of protester held in jail after being found in contempt by Assembly, Supreme

Court took judicial notice that demonstrator publicly stated in Assembly to cheering supporters that they had captured capitol and intended to stay until they got what they wanted, and that protester vowed from speaker's stand in Assembly to remain there until legislature restored funds for welfare recipients.

2. States

Constitution provision that each house may punish for contempt and disorderly conduct is not grant of contempt power but recognition and affirmation of historic and inherent contempt power possessed by legislative branch. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

3. States

Statutes relating to punishment of contempt of either house of legislature were not grant of contempt power but regulation. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

4. Constitutional Law

Where protester upon seeking release from imprisonment for contempt of legislature did not deny contempt or offer defense, and courts were open to determine promptly any question on merits of contempt found to have been committed by summary process before legislature for contempt committed in its presence, due process was satisfied. W.S.A. Const. art. 4, § 8; W.S.A. 13.26, 13.27.

5. Jury

Where term of imprisonment imposed by assembly for contempt committed in its presence was not longer than six months, protester was not entitled to jury trial. W.S.A. 13.26(1a) (b), 13.26, 13.27; W.S.A. Const. art. 4, § 8; Fed. Rules Crim. Proc. rule 42, 18 U.S.C.A.

6. Constitutional Law

Assembly resolution finding that action by protester was disorderly conduct and imprisoning him for contempt committed in its presence was not bill of attainder or bill of pains and penalties. W.S.A. 13.26(1) (b), 13.26, 13.27; W.S.A. Const. art. 4, § 8.

7. Constitutional Law

"Bill of attainder" and "bill of pains and penalties" are same in nature, a special act of legislature inflicting punishment upon person supposed to be guilty of severe offense without trial or conviction in ordinary course of judicial proceedings; penalty in "bill of attainder" is death and in "bill of pains and penalties" a milder degree of punishment less than death.

See publication Words and Phrases for other judicial constructions and definitions.

8. States

Governor was not without power to call special session while legislature was in general session. W.S.A. Const. art. 4, § 11.

The petitioner James E. Groppi was found in contempt by the Assembly of the Wisconsin Legislature on October 1st, 1969, and pursuant to the direction of the resolution of the Assembly was arrested by the respondent and held in the Dane county jail. His application for writ of habeas corpus was denied by the circuit court for Dane county and on October 7th, 1969, he applied to this court to take original jurisdiction to consider his petition for a writ of habeas corpus. While this application was pending, this court on October 8th and again on October 10th, 1969, denied the request of the petitioner to be temporarily released from custody on what he called bail. He was, however, released by the judge of the United States District Court for the Western District of Wisconsin on October 11th and enjoined from coming closer than a prescribed distance from the state capitol building in Madison, Wisconsin. His release does not render the question before us moot or affect our jurisdiction. This court waived oral arguments on the question of leave to take jurisdiction and accepted original jurisdiction on October 9th and heard oral arguments on the merits on October 10th, 1969.

James M. Shellow, William M. Coffey, Robert H. Friebert, Milwaukee, Percy L. Julian, Jr., Madison, for petitioner.

Robert W. Warren, Atty. Gen., Madison, for respondent.

PER CURIAM.

(1) On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protesters into the state capitol building and, proceeded to "take over" the Assembly chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legislative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight. Thereafter the protesters were kept out of the state capitol building by police, sheriffs, and the national guard. The Assembly convened on October 1, 1969, and passed a resolution¹ find-

¹"1969 Spec. Sess. ASSEMBLY RESOLUTION

"Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

"In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a con-

ing the petitioner in contempt for "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings." The Assembly ordered his imprisonment for the duration of the 1969 regular session of the Wisconsin legislature, or for six months, whichever occurred earlier.

Counsel for the petitioner has made it clear he is not contending the Assembly is without authority to deal directly by way of summary contempt proceedings with acts committed in its immediate view and tending to disrupt its proceedings. What is argued in that the contempt proceedings no longer can be summary and the safeguards afforded defendants in criminal prosecutions by the United States Constitution must now be afforded in contempt proceedings involving contempts committed in the presence of the legislature. In such proceedings the petitioner claims he has a right to a hearing of some kind, to be represented by counsel, to compulsory process for the attendance of witnesses, to be informed of the nature and cause of the

tempt under Section 13.26(1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom. (End)"

accusations, to confront his accusers, and to proceed with a defense denying the accusation or giving an explanation for his conduct. This argument equates a finding of contempt and imprisonment by the legislature with a finding of guilt in a criminal trial and criminal punishment. Basically, the argument ignores the purpose and nature of the legislative proceeding and considers imprisonment by the legislative summary contempt process is for a crime and therefore the process must include the constitutional safeguards of criminal procedure in a court of law. A brief review of the origin, the basis, and the scope of the legislative power of summary procedure for contempt committed in its presence is necessary.

(2, 3) From the time of the adoption of our state constitution in 1848, it has been provided in sec. 8, Art. IV, that "each house may * * * punish for contempt and disorderly conduct * * *." In keeping with the recognized rules of construction of state constitutions, we consider this article not to be a grant of contempt power but a recognition and affirmation of the historic and inherent contempt power possessed by the legislative branch of our tripartite government and of the British Parliament. Historically, this contempt power has been considered one of self-defense and of self-preservation. Likewise, we do not consider secs. 13.26² and 13.27,³ Stats., as granting any con-

²"13.26 Contempt. (1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; * * *

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings. * * *

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

³"13.27 Punishment for contempt. (1) Whenever either house of the legislature orders the imprisonment of any person for contempt un-

tempt power to the legislature but as regulation of that power. The forerunners of these sections were adopted in 1849 shortly after the adoption of the constitution. In the light of the law on contempts as it then existed and by their terms, these sections granted no power but limit and proscribe the exercise of the legislative contempt power. It was an expression of the legislative intent to limit its own power to less than that declared by the constitution and less than that exercised by the Parliament. The contempt power in sec. 13.26 was restricted to enumerated offenses and the imprisonment was limited to prevent the occurrence of such offenses during the session of the legislature. Punishment for the sake of punishment or "to teach a lesson" was not provided and was not the object of this confinement. Incarceration by the legislature was not an end in itself but a means to an end, i.e., the freedom to perform its public duties which could only be obtained by imprisonment of the intruders. Assembly Rule 10, which Groppi and his followers were found to violate, provides who has floor privileges when the Assembly is in session. Needless to say, neither Groppi nor his followers qualified or had permission when they forcefully took over the Assembly. However, in sec. 13.27 it was provided as was customary at the time the constitution was adopted that the acts constituting a contempt were also to be a

der s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail."

misdeemeanor which after the adjournment of the legislature but not during the session could be prosecuted. A penalty of \$200 or imprisonment of not more than one year in a county jail was provided.

We point out the resolution of the Assembly did not give James E. Groppi the maximum confinement since it confined him until the end of the session of the legislature but not exceeding a period of six months, whichever event occurred first. Thus if the session of the legislature lasted longer than six months James E. Groppi would still be released from confinement.

The history of the direct contempt power by parliament and the courts of England prior to the adoption of our federal constitution has been a subject of confusing scholarship and acceptance.⁴ It is certain the House of Commons possessed authority to deal directly with contempts without the intervention of courts, including the power to impose prolonged terms of imprisonment. It has been suggested this power rested upon an assumed blending of the legislature and judicial authority possessed by Parliament when the House of Lords and the Commons were one and continued to operate after the division of the parliament into the two houses.

Nevertheless, prior to the adoption of our federal constitution some states recognized the necessity of the legislature to have the power of contempt even though one might consider it a judicial power and granted or recognized the power in the legislature. This was done notably

⁴See Holt, Privilege and Contempt; James, The Power of Congress to Punish Contempts and Breaches of Privilege; Fox, The History of Contempt of Court; Frankfurter & Landis, Power to Regulate Contempts, 37 Harvard L. Rev. 1010.

in Maryland and Massachusetts, whose state constitutions prior to 1787 recognized in the houses of the legislature the power to find persons guilty of contempt committed in their presence. Maryland Constitution of 1776, Article XII; Massachusetts Constitution of 1780, Article Second, chapter 1, section 3, Articles X and XI. In considering these state constitutions, the United States Supreme Court in *Marshall v. Gordon* (1917), 243 U. S. 521, 535, 37 S. Ct. 448, 451, 61 L. Ed. 881, stated the object "could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently, because of the destruction of legislative power which would arise from such acts if such authority was not possessed." Almost contemporaneously with the adoption of the federal constitution similar provisions were written into other state constitutions. See Footnote 1, page 536, 37 S. Ct. 448, *Marshall v. Gordon*, *supra*.

In several United States Supreme Court cases, it has been held that while the inherent contempt power of the House of Commons could not exist in the Congress of the United States because of its delegated powers, nevertheless Congress did have limited implied powers of contempt ancillary and incidental to the legislative powers granted Congress. The first such case so holding was *Anderson v. Dunn* (1821), 6 Wheaton, 19 U. S. 204. This case squarely held that from the power to legislate there was to be implied the right of Congress to preserve itself, i.e., to deal by way of contempt with direct obstructions to its legislative duties.

While in *Kilbourn v. Thompson* (1881), 103 U. S. 168, 26 L. Ed. 377, the court denied to Congress the judicial-legislative power of contempt possessed by the House of Commons, and reserved the question of the right of an implied authority for contempt in the legislature and incidental to the legislative power. But in *re Chapman* (1897), 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154, the existence of an implied legislative authority to deal with direct contempts was upheld.

The court in *Anderson v. Dunn*, *supra*, was almost prophetic in describing what could happen if a legislative body did not have the power of contempt to protect itself. It said, p. 227, "The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which make every individual the tyrant over his neighbour's rights." And the United States Supreme Court goes on to state, "The total annihilation of the power of the house of representatives to guard itself from contempts * * * leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it." In considering the extent of the contempt power which a legislative body may assume upon the principle of self-preservation, the court stated its much quoted test, p. 230, "Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed;' which is the power of imprisonment." Since the contempt power was only to be used to protect the legislature in its deliberation, the duration of the confinement was to be limited to what was necessary and the court held, "that imprisonment must terminate with that adjournment."

Some 47 years later the Wisconsin legislature apparently mindful of this case used its first opportunity to so restrict its power of contempt in what is now sec. 13.26 to limit contempt to self-protection. Thus, Wisconsin, like many other American legislative bodies, did not pretend it possessed the unlimited power of imposing unlimited punishment which constituted the leading feature when contempt originated in the house of parliament in England but enacted sec. 13.27 exercising its legislative power to create a misdemeanor enforceable in a court of law. This restriction of the legislative power of contempt is a recognition of the "minimum of necessity" principle. Universally in the United States it is recognized this power of Congress and of a state legislature is a narrow one. *Jurney v. MacCracken* (1935), 294 U. S. 125, 147, 55 S. Ct. 375, 79 L. Ed. 802. Thus, it has been aptly said of this legislative power in distinguishing it from the judicial power of contempt that necessity initiated it, justified it, and fixes its limits. Dangel, Contempt, secs. 43 and 44; see 17 Am. Jur. 2d, Contempt—Legislative Bodies, sec. 119.

We make no reference by analogy to the judicial power of the courts to punish for direct contempt which is of a different scope and nature. True, the judicial power has been said by this court in *State ex rel. Ashbaugh v. Circuit Court* (1897), 97 Wis. 1, 8, 72 N. W. 193, 194, to be "necessarily inherent in such a court, and arises by implication from the very act of creating the court." We also recognized the judicial contempt power could be "regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience

which is essential to preserve its character as a judicial tribunal." In characterizing the nature of the judicial contempt power, the court said, "It is, and must be, a power arbitrary in its nature, and summary in its execution." It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of citizens imperatively requires that its limits be carefully guarded, so that they be not overstepped. It is important that it exist in full vigor; it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence."

In respect to the judicial power of contempt, there has raged for many years a storm over the summary procedure for contempts committed in the presence of the court. An explanation of the nature of the judicial power is important here to highlight what we think to be a distinction between the judicial power of contempt and the legislative power of contempt.

The history, the scope, and the extent of judicial power have been well explained in the leading cases of the United States Supreme Court.⁵ Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is

⁵*Green et al. v. United States* (1957), 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672; *United States v. Barnett* (1963), 376 U. S. 681, 84 S. Ct. 984, 12 L. Ed. 2d 23; *Watkins v. United States* (1957), 354 U. S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273; *Gompers v. United States* (1914), 233 U. S. 604, 34 S. Ct. 693, 58 L. Ed. 1115.

punishment necessary to maintain the dignity, decorum, and respect for the court. This objective admittedly is also found in punishment for some crimes. In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body. *Marshall v. Gordon, supra.*

While in our representative government the legislature does not and need not have the power of punishment, the Assembly and the Senate which are composed of persons chosen and elected by the people, who are answerable directly to the people, who are removable directly by the people through the elective process and who conduct public hearings to ascertain the will of the people, do need enough power to properly protect themselves and to properly discharge their constitutional responsibility.

The petitioner argues he has not been given a hearing or a trial in the legislature. This is true, but the question is whether he is entitled to a hearing. What is there to hear? It is not denied that his acts were contemptuous. It is not denied that he obstructed the legislature and made it impossible for the governor of Wisconsin to address the Assembly on the very subject matter which was of concern to the protesters. When the petitioner stood at the rostrum of the Assembly and protesters crowded the aisles and stood on the legislator's desks, when the speaker of the Assembly was unable to restore any semblance of order, what need is there for witnesses to tell the Assembly

as a body what it witnessed. These facts are not disputed by the petitioner in this proceeding.

(4) We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27 the contemnor may be discharged before his time by "the due course of law." The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense. We think due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence.

The value of the necessity of the summary contempt power of the legislature in direct contempts must be balanced with the rights of individuals who run afoul and interfere with the proper functioning of their government. We thing respect for lawful authority, the maintenance of order, the preservation and the right to exercise the legislative duties efficiently and without disruption and the recognition of other citizens' rights to have their elected representatives conduct their proceedings demand that the limited legislative power to deal with contempts committed in its presence by summary procedure should so remain and be promptly reviewable by the judiciary at the instance of the contemnor.

We are not overlooking *Bloom v. Illinois*, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522, wherein the Supreme Court after some years of staving off an insistent attack on the summary power of the courts in judicial contempt held in one sweep of the sword that in matters involving imprisonment of over six months in direct judicial contempts, the contemnor was entitled to a jury trial. The opinion was not written upon a clean slate, but it did erase *Green v. United States*, *supra*, and *United States v. Barnett*, *supra*, holding a jury trial was not required in judicial cases of direct contempt, and with them, some 50 other cases holding there was no distinction for a jury trial based on the seriousness of the offense. But this distinction of petty crimes for jury trial purposes was made in *Duncan v. Louisiana* (1968), 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, and applied to the states. By *Bloom*, it was applied to judicial contempts and while special mention of contempts in the presence of the court was made, the court concluded that a criminal contempt was like other crimes, "in so far as the right to jury trial is concerned." Thus a judicial contempt carrying a punishment of six months or less need not be tried by a jury. Such contempts carrying more than six months imprisonment must be afforded a constitutional jury trial. This decision has engrafted the jury trial on Rule 42 of the Federal Rules of Criminal Procedure. We do not consider this case controlling legislative contempts because as pointed out in this opinion the confinement for legislative contempt is inherently not punishment and is different from either judicial contempt imprisonment or imprisonment for a crime.

(5) Assuming but not deciding the rule of *Bloom v. Illinois, supra*, does apply to legislative contempts, this petitioner would not be entitled to a jury trial or a hearing before the legislature because the maximum term of confinement provided by the resolution of the Assembly does not exceed six months. We do not consider the effect of *Bloom* if the petitioner is prosecuted in a court for a misdemeanor after the termination of the session of the legislature. If a jury trial were required, it would be impracticable if not impossible to hold it before the Assembly. Under no reasoning does *Bloom* require a hearing in the legislature. If the petitioner is not entitled to a trial or hearing before the legislature, there is little need for an attorney, for the compelling of witnesses, or an explanation of his conduct, for these rights are necessarily dependent upon a hearing. The petitioners have cited no cases holding summary proceeding for direct contempt of a legislature to be unconstitutional and we have not found any. The only practical way a contempt in the presence of the legislature can be handled is by summary process reviewable by the judiciary. We think it is neither a necessary nor an acceptable construction of the constitution that a trial or a hearing be engrafted upon the legislative contempt power when the judiciary will immediately review the action of the legislature and has the power to grant adequate and appropriate relief.

(6, 7) The petitioner argues the Assembly resolution is a bill of attainder prohibited by the United States Constitution. There is not merit in this contention. The petitioner was not found guilty of a crime by legislative act. Nor is the resolution of the legislature a bill of pains and penalties. Both of these bills are the same in nature—a

special act of the legislature inflicting punishment upon a person supposed to be guilty of a severe offense without a trial or a conviction in the ordinary course of judicial proceedings. The penalty in the bill of attainder is death and in the bill of pains and penalties a milder degree of punishment less than death. See Black's Law Dictionary, bill of attainder. 11 Am. Jur., Constitutional Law, sec. 347, p. 1175.

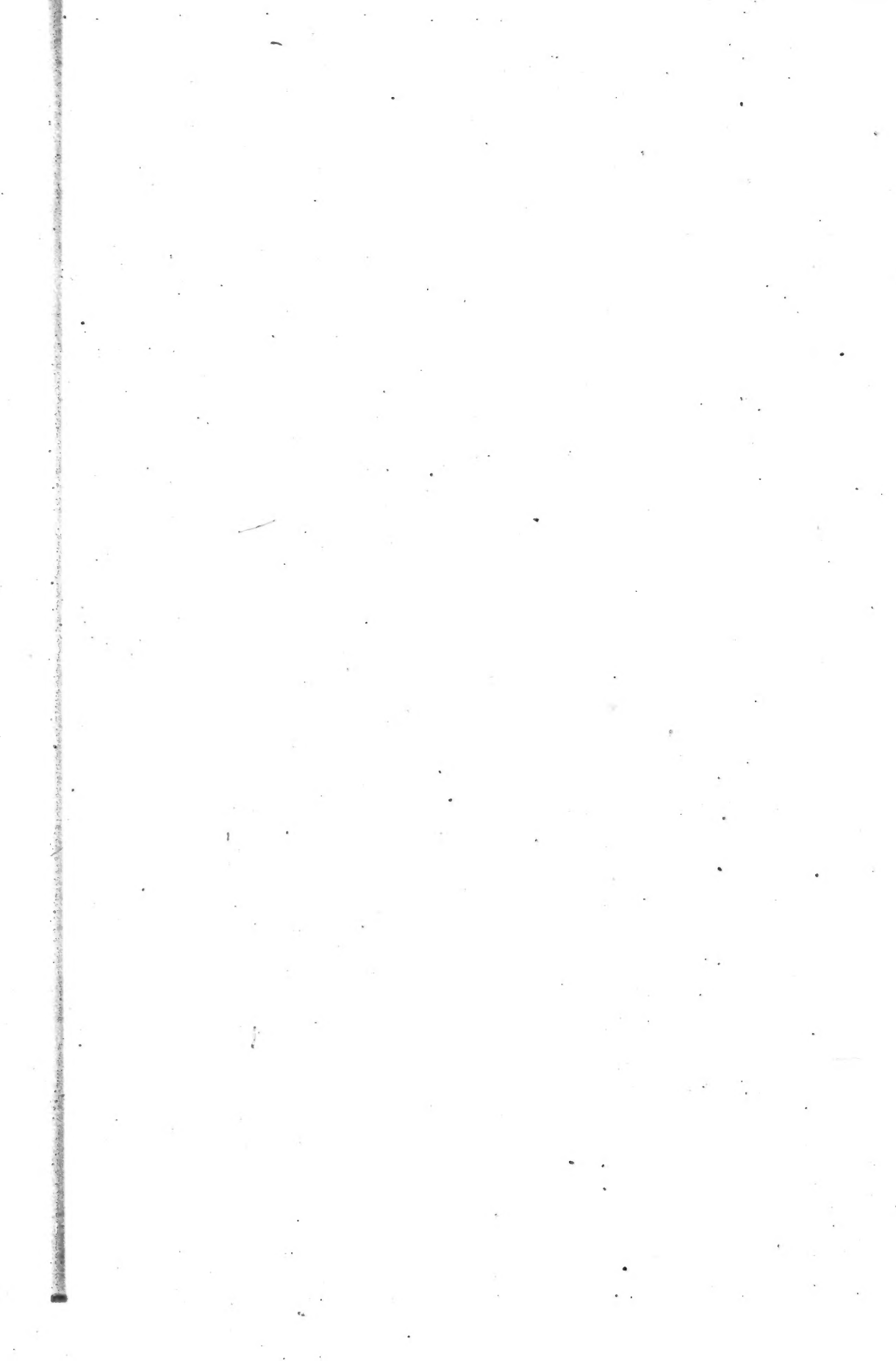
(8) The petitioner argues the resolution of the Assembly is invalid because the Assembly was not in a valid special session. He bases his argument on the premise the governor has no power to call a special session of the legislature before the legislature in a general session has adjourned *sine die*. Section 11, Article IV, of the Wisconsin Constitution, provides:

"The legislature shall meet at the seat of government at such time as shall be provided by law, * * * unless convened by the governor in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purpose for which it was convened."

The constitution does not limit the power of the governor to call special sessions only when the legislature is not in session. The purpose of a special session is to accomplish a special purpose for which it has convened. To deny the governor the power to call a special session while the legislature is in general session would in effect deny the governor the right to call the legislature into session to give priority consideration to those items he claims are of immediate statewide concern. This power of the governor

is a part of the checks and balances in our tripartite form of government.

We hold the Assembly exercised its contempt power validly in finding the petitioner in contempt and, therefore, the petition of James E. Groppi for a writ of habeas corpus is hereby denied.



APR 6 1971

E. ROBERT SEAVER, CLERK

In The
SUPREME COURT of the UNITED STATES

October Term, 1970

No. ~~1549~~

70-112

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

WILLIAM M. COFFEY
ROBERT J. LERNER
JOHN D. MURRAY

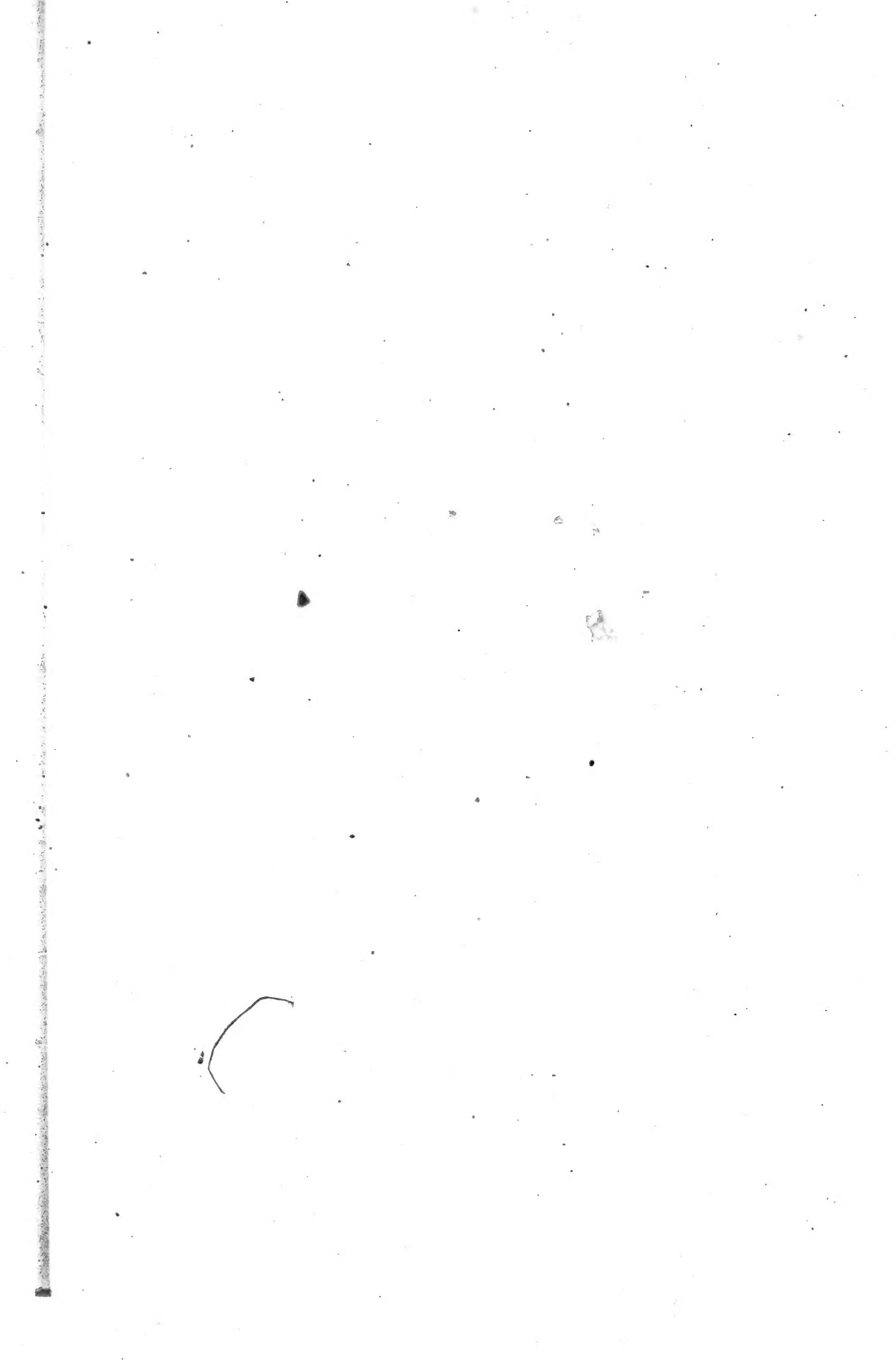
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In The
SUPREME COURT of the UNITED STATES

October Term, 1970

No. _____

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner JAMES E. GROPPi prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 6, 1971.

Citation to Opinion Below

The opinion of the United States Court of Appeals on re-hearing *en banc* is reported at 435 F. 2d 331 (1971); and printed in the Appendix, *infra*, pp. 1a-10a. The opinion of the United States Court of Appeals is reported at 435 F. 2d 326 (1970), and printed in the Appendix, *infra*, pp. 11a-19a. The opinion of the United States District Court,

Western District of Wisconsin, is reported at 311 F. Supp. 772 (1970), and printed in the Appendix, *infra*, pp. 21a-40a.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit after re-hearing *en banc* was entered on January 6, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254(1).

Constitutional Provisions Involved

Article IV, Sec. 8, Wisconsin Constitution

Rules; contempts; expulsion

Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with concurrence of two-thirds of all members elected, expel a member, but no member shall be expelled a second time for the same cause. (Wis. Stats., 1967, p. 35).

Statutes Involved

Sec. 13.26 Wisconsin Statutes

Contempt

(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

* * *

(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

* * *

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature. (Chp. 13, Wis. Stats., 1967, p. 202).

Sec. 13.27 Wisconsin Statutes

Punishment for Contempt

(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail.

Questions Presented

1. Whether a legislative body can, consistent with due process of law, two days after alleged contemptuous conduct, *ex parte* imprison a person under its contempt power without giving the person any notice of the charge against him or any opportunity whatsoever to appear before the legislative body and respond to the charge.

2. Whether consistent with due process of law a person can be found in contempt of a legislative body when the legislative contempt resolution sets forth mere conclusions and fails to set forth any underlying facts or circumstances which constituted the alleged contemptuous behavior.

Statement of the Case

On October 1, 1969, the Assembly, one of two houses of the State of Wisconsin Legislature, passed the following resolution:

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane County Jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 Regular Session of the Wisconsin Legislature in violation of Assembly Rule 10, prevented the Assembly from conducting public business and performing its constitutional duty; now therefore be it

Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the House and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26(1) (b) of the Wisconsin Statutes and Article 4, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Section 13.26 and 13.27 of the Wisconsin Statutes orders the imprisonment of James E. Groppi for a period of six months or for the duration of the 1969 Regular Session, whichever is briefer in the Dane County Jail and directs the Sheriff of Dane County to seize said person and deliver him to the jailer of the Dane County Jail; and be it further

Resolved, That the Assembly directs a copy of this resolution to be transmitted to Dane County District Attorney for further action by him under Sec-

tion 13.27(2) of the Wisconsin Statutes; and be it further

Resolved, That the Attorney General is respectfully requested to represent the Assembly in any litigation arising herefrom.

Subsequently a copy of the Resolution was served on Groppi and he was imprisoned in the Dane County Jail. Groppi was never served with a copy of the Resolution prior to his imprisonment and was afforded no specification of the charge against him, no notice and no hearing. The Circuit Court for Dane County dismissed Groppi's application for a Writ of Habeas Corpus as did the Wisconsin Supreme Court. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192 (1969).

After the Dane County Circuit Court denied Groppi's petition a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Western District of Wisconsin pursuant to Sec. 1254, T. 28, U. S. C. Groppi was admitted to bail by the District Court after the Wisconsin Supreme Court denied his petition. At that time he had served ten days of the sentence imposed by the Assembly under the Resolution.

On April 8, 1970, the District Court held the Assembly could not summarily impose a jail sentence for legislative contempt without first providing Groppi with some "minimal opportunity" to appear and to respond to the charge. Accordingly the Court granted the Writ of Habeas Corpus and ordered that Groppi be released from any further custody or restraint pursuant to the Resolution. *Groppi v. Leslie*, 311 F. Supp. 772 (W. D. Wis. 1970).

On October 28, 1970, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and directed that an order be entered denying Groppi's petition for habeas corpus and granting the Respondent Sheriff's motion to dismiss. *Groppi v. Leslie*, 435 F. 2d 326 (1970). Subsequently, the Court of Appeals granted Groppi's petition for a rehearing *en banc* and in a four to three decision affirmed the Court's decision of October 28, 1970. *Groppi v. Leslie*, 435 F. 2d 331 (1971).

Reasons for Granting the Writ

The petition raises substantial and important questions concerning the extent and nature of the power of summary contempt and the procedural rights guaranteed to a person charged with legislative contempt. This Court has not passed on these issues and this case remains unprecedented historically and legally. There are no reported instances where a legislative body imprisoned an individual without giving him an opportunity to respond as charged. The decision of the Court of Appeals has for the first time in the history of jurisprudence held that a legislature may imprison an individual for six months without giving him a right to appear and respond to the charges against him. Further, the Court of Appeals has denied to Groppi the procedural safeguards which would have been available to him if he had been charged with judicial contempt. The issues involved herein are similar to those raised in *Mayberry v. Pennsylvania*, decided by this Court on January 20, 1971, 8 Cr. L. Rptr. 3065, where this Court held a judge should not sit in judgment of an individual

who he has cited for contempt except where necessary to immediately vindicate the court's authority.

I.

Our system of Government is premised on the assumption that the individual must be protected against the exercise of absolute power by the Government. It is contrary to our system to allow a person to be imprisoned without giving him an opportunity to respond to the charges against him.

Before any governmental body may act to injure an individual he is entitled to a minimal opportunity to be heard. This principle has been stated in many areas involving the interrelationship between the Government and the citizen. *Goldberg v. Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (termination of welfare benefits); *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (disqualification for unemployment compensation); *Slochower v. Board of Higher Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956) (discharge from public employment); *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (C. A. 5, 1961) (suspension from public school); *Hahn v. Burke*, 430 F. 2d 100 (C. A. 7, 1970) (revocation of probation); *McCarley v. Sanders*, 309 F. Supp. 8 (M. D. Ala. 1970) (expulsion of a member of a Legislature).

In *Brown v. United States*, 359 U. S. 41, 79 S. Ct. 539, 3 L. Ed. 2d 609 (1959) and *Levine v. United States*, 362 U. S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960), this Court upheld summary contempt convictions but stressed the fact the trial court in each case had allowed the defendants to

be heard prior to imposing sentence. 359 U. S. at 52, 362 U. S. at 613-14. Also see *Panico v. United States*, 375 U. S. 29, 84 S. Ct. 19, 11 L. Ed. 2d 1 (1963). In addition the right of allocution has long been recognized in cases of judicial summary contempt. See *In Re Maury*, 205 Fed. 626 (C. A. 9, 1913).

II.

In a case involving summary contempt under the provisions of Rule 42(a) of the Federal Rules of Criminal Procedure, Judge Friendly dissenting in part stated that "summary" means "only that certain usual procedural requirements may be dispensed with not that basic rights can be sacrificed." *United States v. Galante*, 298 F. 2d 72, at p. 78 (C. A. 2, 1962). The majority opinion in *Galante* while not approving the lack of an opportunity to respond to contempt charges found no reversible error since there had been no request to be heard and no indication the trial court would have denied the defendant therein that right.

The procedures followed by the Wisconsin Assembly under the terms of its contempt resolution violated the ancient maxim that "no man shall be punished before he has had an opportunity of being heard". *The King v. Benn and Church*, 6 T. R. 198 (1795) (Lord Kenyon, Chief Judge). Without any prior notice to petitioner and without giving him or his counsel any opportunity to be present or to be heard the Wisconsin Assembly cited him for contempt, found him guilty of an offense which had al-

legedly been committed two days earlier and sentenced him to imprisonment.¹

While it has long been held that legislative bodies have contempt powers, *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802 (1935), there is no other reported instance in which a legislative body exercised its contempt power without according the person charged the minimal requirements of due process, that is, notice of the charge against him and an opportunity to answer the charge. In the exercise of its contempt power Congress has always met the minimal due process standards of notice and an opportunity to defend. See: Goldfarb, *The Contempt Power*, 163 (1963). Consistent with this tradition, the District Court herein envisioned a hearing before the Assembly in which the petitioner would have been required to show cause why he should not be punished for his conduct. 311 F. Supp. at 780. Appendix p. 35a. No protracted trial, which would have brought the legislative process in Wisconsin to a halt was contemplated by the District Court or requested by the petitioner herein.

III.

Further, there is no summary contempt power where the charge is not made immediately upon the commission of the alleged contempt. The principal justification for the existence of the summary contempt power by the judiciary is the need for an immediate vindication of the court's authority. See the dissenting opinion of Justice Frankfurter

¹It is interesting to note that petitioner was also charged with disorderly conduct in violation of the Laws of the State of Wisconsin for his alleged conduct in the incident mentioned in the Legislative Contempt Resolution. A jury trial was held in the County Court for Dane County, Wisconsin, on that charge and the petitioner was discharged after the jury was unable to reach a verdict.

in *Sacher v. United States*, 343 U. S. 1, 22 S. Ct. 451, 96 L. Ed. 717 (1952). Similarly, where the contempt power is not necessary for the immediate vindication of the court's authority, due process requires that the subsequent contempt proceedings be held before a judge other than the one citing the contemnor for his conduct. *Mayberry v. Pennsylvania*, United States Supreme Court, January 20, 1971, 8 Cr. L. Rptr. 3065. Also see *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

The failure of the Wisconsin Assembly to act for two days in citing Groppi from the time of the alleged contemptuous conduct indicates there was no need for the exercise of summary contempt powers, denying him any opportunity to respond to the charge.

IV.

Not only was petitioner denied notice of the charge against him and an opportunity to respond thereto, the Assembly's Contempt Resolution merely cited a legal conclusion without any statement of the underlying facts supporting that conclusion. As a result petitioner was placed in an extremely difficult, if not impossible position, in requesting judicial review of the contempt order. Rule 42(a) of the Federal Rules of Criminal Procedure makes explicit the fundamental rule that a judicial summary contempt order must recite sufficient facts which lead to the finding and sentence of contempt. A rule implicit in this Court's decision in *Ex parte Terry*, 128 U. S. 289, 305, 9 S. Ct. 77, 32 L. Ed. 405 (1888). The contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of Government". *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, at p. 8

(1897). As a result procedural safeguards must be strictly adhered to so as to keep this drastic power within the permissible limits of fairness and reason. A strict adherence to procedural regularity has been a potent factor in the development of our liberties. In view of the fact that the Wisconsin Assembly did not see fit to adopt the contempt resolution until two days after the alleged contumacious conduct and at a time when it appeared that the legislative body had returned to its normal processes there is not reason to excuse it from being required to follow the valued procedural safeguards which are essential to our liberty.

CONCLUSION

For the reason stated herein and since certain basic rights inherent in a society of free men can never be sacrificed the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Freedom Through Equality

Attorneys for Petitioner

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970

SEPTEMBER SESSION, 1970

No. 18538

JAMES E. GROPPi,

Petitioner-Appellee,

vs.

JACK LESLIE, Sheriff of Dane
County,

Respondent-Appellant.

} Appeal from the
United States Dis-
trict Court for the
Western District
of Wisconsin.

January 6, 1971

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, KILEY, CUMMINGS, KERNER, PELL and STEVENS, *Circuit Judges*.¹

PELL, *Circuit Judge*. This matter being before the court *en banc* following reargument pursuant to the granting of Groppi's petition for rehearing, we are not persuaded that the result, and reasoning in support thereof, reached by the panel originally hearing this appeal, as set forth in the court's decision of October 28, 1970, is other than correct.

The basic and simple issue remains whether the judicial power of summary punishment² for direct contempt is constitutionally exercisable by the legislative branch. We hold that it is for the reasons advanced in the original

¹ Thomas E. Fairchild, Circuit Judge, has disqualified himself, noting that he was a member of the three-judge court which decided *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970), a closely related case arising out of the same events as *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970), and heard at the same time.

² See *Ex parte Terry*, 128 U.S. 289 (1888).

opinion of this court, which opinion we now adopt and confirm. *Groppi v. Leslie*, F. 2d (7th Cir. October 28, 1970).

While the resolution adopted by the Wisconsin Assembly might well have spelled out the alleged misconduct of Groppi with greater particularity, it nevertheless is couched in terms of ultimate fact which we do not find lacking in adequate specificity. There is no indication to us that the contemnor failed to be fully and explicitly informed of the charge leveled against him and the exact nature of his misconduct.

Our decision is reached on the narrow issue before us, involving direct interference with "conducting public business" in "the immediate view of the legislative body." We do not purport to reach any decision on the matter of contemptuous behavior occurring outside the legislative chamber itself.

Other means for punishing contempts are available to the legislature and resort to such other procedures may be found sufficiently efficacious in the future. We here hold, however, that the basic public need for inviolability of the legislative processes of our government dictates the availability of the power of summary contempt punishment to the legislative branch. The Wisconsin legislature has seen fit in the circumstances of the case before it to exercise that power and we do not deem it in the public interest to interfere.

It is to be noted that Groppi's term of imprisonment under the resolution does not extend beyond the end of the legislative term, i.e., January 7, 1971. Both petitioner's and respondent's counsel have argued that the issue here involved is not mooted by this fact. This is our opinion also. See *United States ex rel. Lawrence v. Woods*, 432 F. 2d 1073, 1074-75 (7th Cir. 1970).

REVERSED.

STEVENS, *Circuit Judge*, with whom SWYGERT, *Chief Judge*, and KILEY, *Circuit Judge*, join, dissenting.

At no time in this proceeding has petitioner asserted any claim of innocence, or any claim that his sentence was excessive. It may be assumed, as the Wisconsin Supreme Court plainly stated, that any such claim would have been promptly and fairly heard in some form of post conviction trial.¹ As the disposition of an isolated controversy, therefore, no one could criticize this court's judgment as unfair or unreasonable.

The case, however, must be decided in the context of our legal traditions. It raises only a procedural issue, but in my judgment that issue is of fundamental importance and requires that petitioner's conviction be set aside. *Cf. Rex v. Justices of Bodmin* [1947] 1 K.B. 321.

The Fourteenth Amendment to the United States Constitution limits the procedures which a state may employ prior to the imprisonment of any person. The applicable clause states: "... nor shall any State deprive any person of life, liberty, or property, without due process of law." One of the oldest and most consistently accepted maxims in our legal tradition is the proposition that "no man shall be punished before he has had an opportunity of being heard." *The King v. Benn and Church*, 6 T.R. 198 (1795) (Lord Kenyon, Ch.J.); see *United States v. Galante*, 298 F.2d 72, 77 (2d Cir. 1962) (Friendly, J., dissenting).

The procedure which Wisconsin employed to deprive the petitioner of his liberty violated that ancient maxim. On October 1, 1969, without any prior notice to petitioner, and without giving him or his counsel an opportunity to be present or to be heard, the Wisconsin Assembly cited him for contempt, found him guilty of an offense which had been committed two days earlier, and sentenced him to imprisonment.² Although I recognize that the due process

¹ See *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 297 (1969).

² That legislative finding not only deprived petitioner of his liberty, it also had a material impact on his procedural rights. Even assuming the availability of a post conviction remedy in which petitioner could have presented evidence or argument denying the rather vague charge in the resolution, the legislative finding eliminated his presumption of innocence and shifted the burden of proof. It would have been necessary for him to go forward with the task of proving a negative before he

clause tolerates flexible procedures in varying situations,³ in my opinion the label "legislative contempt" does not exclude this *ex parte* conviction from the coverage of the Fourteenth Amendment.

Disorderly conduct on the floor of a legislative body is a well recognized species of legislative contempt.⁴ Historically acts of violence,⁵ like other legislative contempts such as attempted bribery,⁶ refusal to answer questions or pro-

³ (Continued)

heard the evidence against him. As a practical matter the value of his privilege against self-incrimination and of his right to be confronted with the witnesses against him would have been debased, if not destroyed entirely.

³ "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-163 (Frankfurter, J. concurring).

⁴ The Supreme Court decision which first upheld the power of Congress to punish contempts treated disorderly conduct in the presence of a legislative body as an established species of legislative contempt. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 217, 228; see *Marshall v. Gordon*, 243 U.S. 521, 543-544; Shull, *Legislative Contempt — An Auxiliary Power of Congress*, 8 Temp. L.Q. 198, 202-203 (1934).

⁵ In 1865, A. P. Field was reprimanded by the Speaker of the House and discharged from custody after a trial before a committee of the house at which he was found guilty of assaulting and wounding a member with a knife. Cong. Globe, 38th Cong., 2nd Sess. 991 (1865). In 1832, Sam Houston was arrested and tried before the House of Representatives for assaulting a member of the House, 8 Debates, 22nd Cong., 1st Sess. 2512-2620, 2810-3022. Perhaps the most famous instance of violence directed against a member of Congress occurred in 1856. Brooks, a member of the House of Representatives from South Carolina, who was offended by a speech, attacked Senator Charles Sumner in the Senate Chambers after adjournment, and beat him with a cane inflicting serious injuries. The Senate determined that the matter properly should be punished by the House, and a hearing was conducted by a Committee of the House which afforded Brooks the opportunity to appear and contest the evidence against him. H.R. Rep. No. 182, 34th Cong., 1st Sess. (1856).

⁶ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, apparently involved an attempt to bribe a member of the House. See 19 U.S. at 215; *Kilbourn v. Thompson*, 103 U.S. 168, 196. The contemnor was brought before the bar of the House and permitted to present a defense, 19 U.S. at 209-210. In 1795 Robert Randall was tried by the House on a charge of attempting to bribe a member and found guilty of contempt, 5 Annals, 4th Cong., 1st Sess. 166-195, 232, 200-229, 237, 243.

duce documents before a legislative committee,⁷ and the destruction of subpoenaed documents,⁸ have been prosecuted by the Legislature itself. In such cases the accused has been brought before the bar of the House and given an opportunity to speak in his own defense before any punishment was imposed. As this type of proceeding was no doubt somewhat cumbersome, and since the duration of any imprisonment was limited to the remainder of the legislative session, Congress long ago provided for the prosecution of contempts in judicial proceedings.⁹ Apparently Congress never considered the possibility of avoiding the inconvenience of a prolonged legislative hearing by simply eliminating the accused's traditional opportunity to be heard in his own defense.¹⁰

Prior to October 1, 1969, no American legislature had found it necessary to employ *ex parte* procedures to punish disorderly or other contemptuous conduct. The fact that the exercise of summary contempt powers has been accepted as a necessary and appropriate aspect of our judicial processes does not support an argument that the Wisconsin Legislature needs or possesses like powers. Indeed, a comparison of the legislative and judicial experience with contempts leads to a contrary conclusion.

It is the business of judges to decide particular cases, to make determinations of guilt or innocence, to listen to arguments in mitigation, and to impose appropriate punishments. Although occasional abuses have required correction on review, by and large the judicial contempt power has proved useful in advancing the orderly disposition of

⁷ *McGrain v. Daugherty*, 273 U.S. 135 (refusal to appear; apparently Daugherty was discharged from custody by a Federal District Court in Ohio before he could be brought before the bar of the Senate, 273 U.S. at 154); *Kilbourn v. Thompson*, 103 U.S. 168 (refusal to answer a question and produce documents; Kilbourn was brought before the bar of the House and allowed to present a defense, 103 U.S. at 174).

⁸ *Jurney v. MacCracken*, 294 U.S. 125 (destruction and removal of subpoenaed documents; MacCracken declined to appear before the bar of the Senate for trial, 294 U.S. at 143, 152).

⁹ 2 U.S.C. § 192 makes the refusal to testify before a committee of Congress a misdemeanor. The original provision, 11 Stat. 155, was enacted in 1857. See *Jurney v. MacCracken*, 294 U.S. 125, 151; see also *In re Chapman*, 166 U.S. 661. In recent years Congress has relied upon the statutory procedure. See Goldfarb, *The Contempt Power* (1963), 43.

¹⁰ Wisconsin's concern that a protracted hearing in this case might have required the legislative process to grind to a halt could, of course, have been eliminated by following the example of Congress.

litigation.¹¹ The conclusion that judges can safely be trusted with such powers is supported by analysis of the judicial function and by years of experience. The multitude of judicial contempt cases which have been decided in our history apparently include none in which a judge, two days after the offense, without giving the contemnor notice or any opportunity to be heard, entered an *ex parte* order sentencing him to prison.¹²

But that is the nature of the procedure employed by the Wisconsin Assembly in this case. This departure from tradition should itself point to the danger of entrusting summary contempt powers to bodies not accustomed to their exercise. The contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of government." *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8 (1897), and its exercise has been narrowly limited.¹³ Without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic.

¹¹ "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 425-426 (Holmes, J. dissenting).

¹² The closest case I have found is *Ex parte Terry*, 128 U.S. 289, in which the contemnor, after being forcibly removed from the courtroom, was forthwith committed for contempt. In that case, however, the Court expressly reserved decision on the question whether a circuit court would have had the power on "a subsequent day" to proceed to order the arrest and imprisonment of the contemnor "without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, . . ." 128 U.S. at 314. In cases in which contempts during the course of a trial are not punished until the end of the proceeding, the contemnor is, of course, continuously present in court and normally given repeated opportunities to be heard in defense or mitigation before the imposition of sentence.

¹³ In *Anderson v. Dunn*, 19 (6 Wheat.) 204, 230, the Supreme Court stated that the legislative contempt power rests upon the principle of self-preservation and is limited to "the least possible power adequate to the end proposed." Cf., *Kielley v. Carson*, 13 Eng.Rep. 225, 234-235 (P.C. 1842).

than are judges.¹⁴ Therefore, history's recognition of a frequent need for summary punishment of judicial contempts does not establish a need for co-extensive legislative contempt powers.

It is argued that there was no risk of error or abuse in this case because petitioner's disorderly conduct occurred "in the immediate view of" the Wisconsin Assembly. It is contended that no purpose could have been served by hearing from petitioner or his counsel because the Assembly already knew all the facts. This may or may not be true. It is entirely possible that conduct which certain legislators found particularly offensive was committed by other members of the "gathering of people" led by petitioner;¹⁵ it is possible that some legislators were particularly offended by insulting speech (perhaps even speech on other occasions)¹⁶ rather than conduct; and that certain conduct was viewed by some legislators but not by others. Even if each member of the Assembly who voted in favor of the resolution had perfect knowledge of the facts, a valid purpose would have been served by hearing from petitioner before voting on the resolution. It is presumed that argument may persuade judges even when they know the facts.¹⁷ I would give legislators the benefit of the same presumption.¹⁸

¹⁴ In the Seventeenth Century a judge who insulted the privileges of the House by questioning its contempt powers was himself subject to contempt proceedings, in which his political unpopularity apparently affected the members' deliberations. See colloquy between the Attorney General and Lord Ellenborough, C.J. in *Burdett v. Abbott*, 104 Eng. Rep. 501, 540-543 (1811).

¹⁵ The opinion of the Wisconsin Supreme Court states that the Legislature could not perform its public duties without "imprisonment of the intruders," 44 Wis.2d at 291, yet the Assembly resolution related only to petitioner.

¹⁶ Legislative attempts to punish disrespectful speech as contempts have occurred in the past but have not met with judicial approval. See *Marshall v. Gordon*, 243 U.S. 521, 545-546.

¹⁷ In judicial proceedings in which there is no genuine dispute as to a material fact, and when only property rights are affected, the court may not enter a summary judgment without proper notice and argument. See Fed.R.Civ.P.56.

¹⁸ When the Assembly voted on the resolution, presumably the need for emergency action had passed. At that time, since the Wisconsin courts disapprove of punishment by the Legislature for past misconduct, an argument questioning the propriety of a legislative sentence of six months would not have been frivolous. 44 Wis.2d at 296.

It is suggested that even if summary legislative contempt powers have been unnecessary historically, the modern day "politics of confrontation" have created a new necessity that requires abandonment of traditional procedures. I question the validity of the argument, even if limited in application to plenary sessions of state legislative bodies, for prompt police action is probably an adequate means of terminating disorder and enabling the legislative body to resume its work. If the argument of necessity were valid, it would prove too much. Confrontations occur in legislative committee hearings, union meetings, stockholders meetings, public parks, college campuses, and the streets. Violent, disorderly conduct in all these settings should be firmly and promptly punished. I am not convinced that the effective administration of justice will be enhanced by using *ex parte* procedures to deal with any of these situations, or by providing an unusual protective procedure available only to legislative assemblies.

If punishment is to serve as an effective deterrent to repeated or widespread disorder, it is important that the community at large have confidence in the fairness of the proceedings which lead to conviction and sentencing.

"At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort in its enforcement to means which shock the common man's sense of decency and fair play." *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis J. dissenting).

In my opinion the preservation of order in our communities will be best ensured by adherence to established and respected procedures. Resort to procedural expediency may facilitate an occasional conviction, but it may also make martyrs of common criminals.

I respectfully dissent.

KILEY, *Circuit Judge*, dissenting.

I join in Judge Stevens' dissent for the reasons he gives.

I dissent for the further reason that the Assembly Resolution does not state facts sufficient to support its conclusion that Groppi was guilty of disorderly conduct punishable as contempt. The effect upon Groppi of this fatal deficiency was denial of fundamental fairness because he is not informed of what he did in the "immediate view" of the Assembly which amounted to disorderly conduct.

Groppi's habeas petition does not expressly cast the deficiency in the Resolution as a denial of due process as we have done. His petition alleges denial of his "right to be informed of the nature and cause of the accusation against him." In this court Groppi argues persuasively the anomaly of a summary or direct contempt order reciting only a legal conclusion without a statement of the underlying facts supporting the conclusion. And he argues that "it is not clear" how a court can adequately review a contempt order unless the facts are stated.²

It is a fundamental rule that a judicial summary contempt order must carry, in itself, a statement of the acts or words constituting the contempt. This rule is implicit in *Ex parte Terry*, 128 U.S. 289, 305 (1888); and is stated in *Tauber v. Gordon*, 350 F.2d 843 (3rd Cir. 1965); *Paramelee Transportation Co. v. Keeshin*, 294 F.2d 310 (7th Cir. 1961); and *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950). In *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (7th Cir. 1969), where an NLRB hearing examiner excluded defendant's counsel from the hearing for "contumacious conduct," this court held that the exclusion violated defendant's due process rights, saying "[n]o compelling reason exists for not extending the requirement of adequate disclosure of the basis for contemptuous conduct findings to the quasi-judiciary as well as the judiciary." *Id.* at 379. Respondent-appellant's brief

¹ Groppi made similar allegations in his petition for habeas corpus in the state proceedings.

² The Wisconsin Supreme Court took judicial notice of facts not in the record. These "facts" are contained in footnote 2 in the majority opinion here.

concedes that legislative exercise of its summary contempt power parallels judicial exercise of that power, and I see no reason why the legislature should not be similarly required to state facts constituting the contempt.

Here the contempt resolution states that "Groppi led a gathering of people . . . which by its presence on the floor of the Assembly during a meeting . . . prevented the Assembly from conducting public business and performing its constitutional duty" and that the "above-cited action" constituted "disorderly conduct in the immediate view" of the Assembly, an offense under Sec. 13.26(1) (b) Wis. Stat. and Art. IV. Sec. 8 of the Wisconsin Constitution. According to the Resolution, anyone—however innocently—who leads a "gathering of people" on the Assembly floor is ipso facto guilty of contempt. There is no statement, for example, of what activities Groppi or the "gathering" engaged in, how they obtained admission to the floor of the Assembly, or how the Assembly was prevented from performing its constitutional functions. All of this is left to the speculation of the reviewing court.

A complaint for disorderly conduct drawn in words similar to the Resolution before us would not support a conviction. *People v. Mulvey*, 135 N.Y.S. 2d 17, 206 Misc. 771 (1954); *People v. Lee*, 334 Ill. App. 158, 78 N.E.2d 822 (1948); *State v. Hettrick*, 126 N.C. 977, 35 S.E. 125 (1900). An indictment, where the subject law is general, must descend to particulars. *Russell v. United States*, 369 U.S. 749, 765 (1962); *United States v. Cruikshank*, 92 U.S. 542, 548 (1875). See also *United States v. Carll*, 105 U.S. 611, 612 (1882). *A fortiori*, where a person is punished by imprisonment without being informed of what he did that was unlawful, he is denied fundamental fairness. No meaningful review would be available to him. See *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (7th Cir. 1969).

Because Groppi has not been informed in the Assembly Resolution what acts or words of his constituted disorderly conduct so as to be contemptuous, I would ~~affirm~~ *affirm*

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970

SEPTEMBER SESSION, 1970

No. 18538

JAMES E. GROPPi,

Petitioner-Appellee,

v.

JACK LESLIE, Sheriff of Dane
County,

Respondent-Appellant.

} Appeal from the
United States Dis-
trict Court for the
Western District
of Wisconsin.

OCTOBER 28, 1970

Before HASTINGS, *Senior Circuit Judge*, CUMMINGS and
PELL, *Circuit Judges*.

PELL, *Circuit Judge*. On October 1, 1969, the Assembly,
one of two houses of the Wisconsin state legislature,
adopted the following resolution:

"Citing James E. Groppi for contempt of the
Assembly and directing his commitment to the Dane
county jail.

"In that James E. Groppi led a gathering of
people on September 29, 1969, which by its presence
on the floor of the Assembly during a meeting of the
1969 regular session of the Wisconsin Legislature
in violation of Assembly Rule 10 prevented the
Assembly from conducting public business and per-
forming its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom."

Subsequent to the adoption of the Assembly resolution, a copy was served upon Groppi and he was imprisoned in the Dane County Jail upon the authority of said resolution. Prior to being served with a copy of the resolution, Groppi was given no specification of the charge against him, had no notice of any kind, nor was any hearing of any kind held. An application for a writ of habeas corpus was dismissed by the Circuit Court for Dane County and thereafter the Wisconsin Supreme Court also denied an application for a writ of habeas corpus and denied a motion for rehearing. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969).

On the same day that the Dane County Circuit Court denied Groppi's petition, a petition for a writ of habeas

corpus was filed in the United States District Court for the Western District of Wisconsin. Groppi was admitted to bail by the district court on the day the Wisconsin Supreme Court denied his petition but after he had served ten days of the sentence imposed by the Wisconsin Assembly. On April 8, 1970 the district court held that the legislature could not summarily impose jail sentence for contempt of the legislature without providing the accused with some minimal opportunity to appear and to respond to the charge. The court accordingly granted the writ of habeas corpus, dismissed the respondent Leslie's motion to dismiss, vacated the order releasing Groppi on bail and ordered that he be released from any further custody or restraint pursuant to the resolution of the Assembly. *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

Simultaneously a three-judge district court held constitutional that portion of the Wisconsin Statutes providing for further prosecution after the adjournment of the legislature, being §13.27(2), Wis. Stat. *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970).

An exposition of the development of our law on the power of not only courts but legislatures to punish for contempt is to be found in both the decision of the Wisconsin Supreme Court and of the single-judge district court¹ and no worthwhile purpose will be served by burdening this opinion with a repetition thereof. Suffice it to say that the law as it presently exists is that the legislature as well as the court has the power to punish for contempt and further that where all of the essential elements of the misconduct are under the eye of the court and are actually observed by the court, the judge has the power to impose punishment summarily. The sole issue now before us on this appeal is as stated in the brief filed on behalf of Groppi: "Should the summary power of contempt to imprison a person without a notice or hearing be extended to a legislature."

The district court concluded "that such punishment may not be imposed by a legislature without at least

¹ *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969); and *Groppi v. Leslie*, 311 F. Supp. 772 (W.D. Wis. 1970).

providing the accused with some minimal opportunity to appear and to respond to a charge." (311 F. Supp. at p. 777). We disagree.

Groppi contends that there is no historical precedent for the exercise of summary contempt power by the legislature. Insofar as reported court decisions are concerned the contention appears to be correct. Conversely, we have found no reported decisions holding that the legislature does not have summary contempt power. The fact of this apparent lack of authority either way suggests that instances of leading a gathering of people on to the floor of legislative halls and preventing the legislature from conducting public business are extremely rare if not virtually non-existent to this time in the United States.

Groppi further contends that our legislatures have apparently not needed summary contempt powers as they have functioned to date without that power. This assertion rather begs the question as it is not possible to tell whether they have functioned without the power if the need has not heretofore arisen for the use of the power. Whether the legislature does have the power is the issue before us. Whether legislatures in the future will have the need for summary contempt power may well be a *sequela* of the ultimate decision in the case before us.

We cannot be unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country and this appeal, presenting, as it appears to do, a case of first impression, assumes in our judgment critically significant proportions as to the ability of deliberative legislative bodies to carry on their governmental functions.

While it might be difficult to equate with any degree of equanimity orderly governmental procedures with the effect of the conduct of Groppi as stated in the opinion of the Wisconsin Supreme Court,² and while the taking of

² "On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protesters into the state capitol building and proceeded to 'take over' the Assembly chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legis-

the law into one's own hands, no matter how worthy the cause might be, is arguably an insecure basis from which to complain of swift and summary punishment, nevertheless, putting aside these considerations we determine the question here involved as a legal issue in a constitutional context. For the purposes of this appeal we are considering only the bare allegations of the Assembly resolution that Groppi led a gathering of people on the floor of the Assembly during a session thereof and prevented the Assembly from conducting a public business. It is on this factual basis we hold that the legislature may properly punish summarily for contempt.

It must also be borne in mind that we have here involved not mere words of incitation but rather deeds and acts of actual physical force.

The court below was of the opinion that the minimal requirements of procedural due process could be provided by the legislature with little delay, presumably referring to a legislative hearing. However, the invasion here involved is not of a committee or subcommittee of the legislature but of the legislative hall itself. Again, we cannot be unmindful of the protracted nature of court proceedings which involve a *cause célèbre*. The courts, notwithstanding occasional difficulties, are essentially designed to devote the necessary time. The legislature is not. Counsel for Groppi conceded during the argument on this appeal that conceivably a full legislative hearing could cause the work of the body to grind to a halt for several weeks. We find such a contemplation intolerable on the American scene.

We agree with that part of the decision of the district court (311 F. Supp. at 780) which disagreed with the

² (Continued)

lative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight." *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, ..., 171 N.W. 2d 192, 194 (1969).

declination of the Supreme Court of Wisconsin³ to draw an analogy between courts and legislatures with respect to the power to punish direct contempt. If the only purpose of the summary contempt power was to remove from the legislative halls persons obstructing legislative activity, this no doubt could be ordinarily expeditiously accomplished by summoning the necessary police. The district court recognized that legislatures do impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. This is, in our opinion, as it should be. While we recognize that there is some disagreement as to the extent to which punishment is a crime deterrent, we are yet to be convinced that freedom from immediate and summary punishment would be any deterrent to proscribed activities.

In the opinion from which this appeal is taken, the district court adverted (at p. 777) to the possibility of a destruction of the parallel of the legislative situation to the court's summary powers because of the question whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1 and were "actually observed by those members." In view of the fact that regularly constituted legislative sessions are frequently marked by substantially less than a full attendance on the "floor" by all members of the body, it may be arguable whether the strict standards enunciated in *In re Oliver*, 333 U.S. 257, 274-75 (1948),⁴ need be scrupulously observed or whether it may not be adequate that proceedings were disrupted for those who were in the chamber at the time, that no further proceedings could be had during the continuance of the invasion and that the resolution of punishment be adopted by at least a majority of the body as a whole irrespective of whether each individual member there personally observed the misconduct. We do not

³ 44 Wis. 2d at 296, 171 N.W. 2d at 198.

⁴ "[F]or a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but * * * the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct."

need to determine this issue. The question of fact of whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later was not timely presented to the state courts of Wisconsin and it would therefore appear that there had not been an exhaustion of remedies available in the courts of this state. 28 U.S.C. §2254. Further, there is no allegation which would serve to create an issue of fact included in the petition filed in the district court. The issue appears to have been created by the district court's opinion. We do not on this appeal deem it necessary to indulge in a presumption of non-regularity of the Assembly proceedings. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929).

The district court in its opinion, while expressing some skepticism (at p. 778) as to the viability, or at least desirability, of the doctrine of summary contempt power insofar as the courts are concerned, nevertheless, accepting the court situation as established law, found a basis for differentiating the factual situation presented on the one hand in the courtroom and on the other hand in the legislative chambers. Thus the court felt that the physical contours of most legislative chambers, the comings and goings of the members and the diffusion of attention of the members among other factors would render it improbable that all the members present would share a uniform perception and evaluation of the incident as would the single judge. The court's conclusion was that the room for error inherent in the response of a large group was so great as to require that it observe some minimal procedures before it invoked its contempt power. However, the matter is not before us on the factual basis of perceptivity of witnesses. It is before us on the basis that James E. Groppi led a gathering of people onto the floor of the Assembly and prevented the Assembly from conducting its business. The Wisconsin Supreme Court made it clear in its decision that factual matters such as erroneous perceptivity would be subject to review in the courts of that state. (171 N.W. 2d at p. 198). The court pointed out that Groppi had not sought a hearing in the Wisconsin Supreme Court or any court

on the merits of the contempt issue, and that he had not offered any defense nor denied that his acts amounted to a contempt, although the court had allowed him to amend his complaint to present any matter he wished.

As a matter of fact, there is a complete absence in the record before us in the proceedings in the federal district court and in this court on appeal of any denial by Groppi of the contemptuous acts with which he was charged. The sole contention of Groppi is simply that he should not have been summarily punished for the charged contemptuous acts.

To the extent that Groppi appears to be urging a jury trial pursuant to *Bloom v. Illinois*, 391 U.S. 194 (1968), we do not find *Bloom* applicable here as the punishment provided for in the resolution could not in any event have exceeded six months. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), *Dunkin v. Louisiana*, 391 U.S. 145, 162 n. 35 (1968).

Insofar as Groppi contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties, we agree with the district court on the invalidity of this contention and adopt and approve that portion of the district court's opinion.

The district court in its opinion also expresses the thought that unlike many courts of record, frequently, if not typically, no verbatim written record of legislative proceedings exists. Acts of violent disruption, such as those which have occurred recently in the state courts of California, would seem scarcely to lend themselves to a reporter's transcript any better than would the acts charged against Groppi in the resolution of the Wisconsin Assembly. In any event, a question of what happened factually and whether it is to be determined from a court reporter's transcript or from the mouths of eye witnesses is one which is not determinative of the issue before us. The proof of what happened in the legislative halls will be the same whether the legislature has to have a hearing prior to punishment or whether the hearing is in a court for a review of a claim of lack of factual basis for the punishment.

We share the laudable concern of the district court for the full protection of procedural rights guaranteed to the individual by the due process clause of the Fourteenth Amendment. In essence, however, we have in the case before us a situation in which we must balance claimed constitutional procedural rights of the individual citizen against the welfare of the citizenry as a whole. We find the scales weighted in favor of the citizenry. In so doing we do not feel we are adopting an alarmist view in recognizing validity in the respondent's position that protracted and frequent legislative trials, if necessary, could easily and realistically become a favorite tool in the politics of confrontation and obstruction, and representative government (whatever its present faults) would go down to defeat.

We reach with some reluctance any decision which appears even remotely to achieve an eroding effect on basic civil liberties as guaranteed by our constitution; but believing, as we do, that illegal and physically forcible interference with properly functioning governmental institutions would pose the real risk of being eventually accompanied by the abolition, rather than the erosion of the individual constitutional liberties, we are unable to reach any other result in the case before us.

For the reasons hereinbefore indicated, the judgment of the district court is reversed, the petition for habeas corpus is hereby denied and respondent-appellant's motion to dismiss is hereby granted.

REVERSED.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

21a

APPENDIX
IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

OCTOBER TERM, 1970, APRIL 8, 1970

No. 69-C-241

JAMES E. GROPP, JR.,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

OPINION AND ORDER

This is a petition for habeas corpus in which it is alleged that petitioner is in custody in violation of the Constitution of the United States. 28 U. S. C. § 2241(c) (3). A response has been filed. Petitioner has been admitted to bail pending a decision on his petition.

Findings

Upon the basis of the entire record, I find:

On October 1, 1969, the Assembly, one of two houses of the Wisconsin state legislature, passed the following resolution (entitled "1969 Spec. Sess. Assembly Resolution"):

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26(1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Section 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

A copy of the Assembly resolution was subsequently served upon petitioner and he was imprisoned in the Dane County jail upon the authority of the said resolution. Prior to being served with a copy of the resolution and imprisoned, petitioner was afforded no specification of the charge against him, no notice of any kind, and no hearing of any kind. Thereafter, petitioner unsuccessfully sought to obtain his release by commencing various actions and proceedings in the state courts and in this court. The Circuit Court for Dane County dismissed petitioner's application for a writ of habeas corpus. The Wisconsin Supreme Court thereafter denied petitioner's application for a writ of habeas corpus, and denied a motion for rehearing. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282 (1969).

Wisconsin Constitution and Statutes

Article IV, Section 8, Wisconsin Constitution, provides, in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior.

Section 13.26, Wisconsin Statutes, provides, in part:

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . . :

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings. . . .

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27, Wisconsin Statutes, provides:

"(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

"(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail."

Contentions of Parties

The petition for habeas corpus asserts that respondent sheriff's custody of petitioner pursuant to the Assembly resolution is unlawful because:

"petitioner has been denied the right to be represented by counsel, the right to a trial or hearing of any kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges."

The petitioner further asserts that the Assembly action constitutes "a bill of attainder and/or pains and punishments"; that the Assembly resolution is invalid because the Assembly was not legally in either regular or special session either on the date of the alleged offense or on the date the resolution was passed; and that the remedies available to petitioner in the state courts are ineffective and inadequate to protect petitioner's rights.¹

The respondent denies that petitioner's detention violates the Constitution of the United States, and moves to dismiss because the petition fails to state a claim upon which relief can be granted. No evidentiary hearing has been held. A hearing on issues of law has been held in this habeas corpus proceeding in conjunction with a hearing in a related three-judge case, *Groppi v. Froehlich*, 69-C-235.

¹Subsequent to the filing of the petition for habeas corpus in this proceeding in this court, the Supreme Court of Wisconsin denied a petition for habeas corpus. It is conceded that petitioner has now exhausted his state remedies with respect to those issues raised by his petition in the Wisconsin Supreme Court and those issues acted upon by that Court. 28 U. S. C. § 2254.

Procedural Due Process

In *Ex parte Terry*, 128 U. S. 289, 313 (1888), this broad statement of the courts' contempt power appears:

We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.

This power in the courts has been reaffirmed frequently. *United States v. Barnett*, 376 U. S. 681, at 698 (1964); *In re Murchison*, 349 U. S. 133, 134 (1955); *Sacher v. United States*, 343 U. S. 1, at 8 (1952); *Fisher v. Pace*, 336 U. S. 155 (1949); *Cooke v. United States*, 267 U. S. 517, 534-535 (1925); *Ex parte Hudgings*, 249 U. S. 378, 383 (1919); *Ex parte Savin*, 131 U. S. 267, 277 (1889). See Rule 42(a), Federal Rules of Crim. Proc.; 18 U. S. C. §§ 401, 402.

Commenting upon *Ex parte Terry* 60 years later, the Court emphasized that it had "recognized that such departure from the accepted standards of due process was

capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of court-disrupting misconduct which alone justified its exercise." *In re Oliver*, 333 U. S. 257, 274 (1948). The Court continued (333 U. S. 274-276):

That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases; was spelled out with emphatic language in *Cooke v. United States*, 267 U. S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 536.

Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation; have the right to be represented by counsel, and have a chance to testify and call other wit-

nesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, that the accused be accorded notice and a fair hearing as above set out.

In *Holt v. Virginia*, 381 U. S. 131 (1965); *Offutt v. United States*, 348 U. S. 11 (1954), and *Cooke v. United States*, 267 U. S. 517 (1925), the Court has demonstrated how narrowly circumscribed is the area in which summary power may be exercised by a court.²

I turn to the subject of contempt of a legislative body. That agreeably to the Constitution of the United States a legislative house (hereinafter "legislature") may impose a jail sentence for contempt of the legislature is long established and has been reaffirmed in modern times. *Journey v. MacCracken*, 294 U. S. 125 (1935).³ However, in *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 208 (1821); *Kilbourn*

²Oklahoma has required, by its Constitution, Art. 2, § 25, that an opportunity to be heard must always precede imposition of a penalty or punishment for contempt. This requirement applies even to contemptuous conduct in the immediate view of the judge. *Sullivan v. State*, 419 P. 2d 559 (Okla. Ct. of Crim. App. 1966); *Young v. State*, 275 P. 2d 358 (Okla. Ct. of Crim. App. 1954).

³I consider hereinafter this petitioner's contention that the Assembly resolution under which he is confined is a bill of attainder or a bill of pains and penalties.

v. Thompson, 103 U. S. 168, 173 (1880); *Marshall v. Gordon*, 243 U. S. 521, 532 (1917); *McGrain v. Daugherty*, 273 U. S. 135, 153 (1927), and *Jurney v. MacCracken*, *supra*, at 144, before being cited for contempt, the accused had been brought before the House or Senate to answer the charge or to purge himself. I am aware of no decision of the Supreme Court of the United States or of the Court of Appeals for this circuit in a case in which the contumacious behavior was said to have been disorderly conduct in the immediate view of the legislature and directly tending to interrupt its proceedings, nor any in which the legislature undertook to impose punishment summarily. I consider the question raised here to be an open question.

The petitioner has neither denied nor admitted in this court that he engaged in the conduct described in the Assembly resolution: namely, that he led a gathering of people which by its presence on the floor of the Assembly prevented the Assembly from conducting public business and performing its constitutional duty.⁴ The Supreme Court of Wisconsin has concluded, implicitly if not explicitly, that such conduct violates Sec. 13.26, Wis. Stat., which prohibits "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings";

⁴Whether the Assembly was in regular session or special session on the date of the alleged offense or on the date the contempt resolution was passed is a matter of state law. In a habeas corpus proceeding here, petitioner may challenge the lawfulness of his custody only on the ground that it is "in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241(c) (3). *United States ex rel. Greer v. Pate*, 393 F. 2d 44 (7th cir. 1968), cert. den. 393 U. S. 890 (1968):

this construction of the state statute is binding on me.⁵ I conclude that if such conduct had occurred in a courtroom in the presence of a judge, "where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court" (*In re Oliver*, 333 U. S. at 275), the judge would have been empowered to impose a jail sentence summarily. The precise question is whether such conduct in a legislative chamber may be punished summarily by a legislature by confinement in jail.⁶ I conclude that such punishment may not be imposed by a legislature without at least providing the accused with some minimal opportunity to appear and to respond to a charge.

The Assembly resolution passed October 1 recites that petitioner engaged in certain acts September 29. The question arises whether "all of the essential elements of the misconduct" occurred "under the eye of" the members who voted affirmatively October 1, and were "actually observed" by those members. If not, the parallel to the court's sum-

⁵In its opinion, the Supreme Court of Wisconsin, apparently by an exercise of judicial notice, referred to numerous events and circumstances which were said to have occurred in and around the State Capitol September 29 and thereafter. No evidentiary hearing had been held by that Court, or at its direction, and none has been held in this court. So far as the events of September 29 in the Assembly chamber are concerned, the only version of the facts is that contained in the Assembly Resolution of October 1. Obviously, the incident and its aftermath were abundantly reported by the news media. It may appear precious for a court to refrain from accepting accounts of such an incident which are generally accepted by the public. For some purposes, it may be practical for a court to accept them. For example, it should not be necessary for a court to receive evidence that extensive rioting had occurred in a community prior to the particular events involved in a case. But the central issue in this case is whether, in circumstances such as these, a specific person who is said by the press, radio, or television to have engaged in certain specific acts may be imprisoned without those minimal procedures necessary to insure against mistaken impressions.

⁶Clearly, so far as the Constitution of the United States is concerned, the legislature, or members or officers or agents thereof, are free to remove from the house one engaging in such conduct and for a reasonable time to bar him from reentering. The issue here relates to imposing a term in jail.

mary powers is destroyed. It is a question of fact whether the petitioner's acts on September 29 were observed by a specific member who voted affirmatively two days later. How this issue of fact is to be resolved presents a problem. The text of the October 1 resolution is silent on the point, and the record in this court sheds no light on it.⁷ To impose the burden of proof upon the petitioner would be unreasonable; it would probably require him to take a discovery deposition of each member of the house (or at least of a number of those voting affirmatively October 1 which number would constitute a majority of those present and voting). When there is involved a power so extreme that its use by a court has been limited with intense care, the validity of its use by a legislature may not be made to depend upon a presumption of fact concerning whether the September 29 acts were observed by the October 1 voters.

However, even if the Assembly record itself or evidence presented in a court later, were to establish that there were present in the Assembly chamber September 29 a sufficient number of those members voting affirmatively October 1, I would conclude that the due process clause of the Fourteenth Amendment would forbid these members to impose a jail term upon the accused without first providing him with a reasonable opportunity to respond to a stated charge.

In my view, it is an anachronism that a judge should be permitted today to impose a jail term upon a contemnor with first providing him with a reasonable opportunity to

⁷Compare Rule 42(a), Federal Rules of Criminal Procedure: "A criminal contempt may be punished summarily if a judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

respond to a stated charge. The doctrine with respect to courts is of ancient origin. Even in its present restricted and battered state, it is an unseemly aberration in a mosaic of procedural rights guaranteed by the due process clauses of Fifth and Fourteenth Amendments in many less compelling situations. But the doctrine does enjoy some slender roots in practical common experience. That is, when by the exercise of his own senses, the judge is a witness to the totality of the incident—the time at which it occurred, the place at which it occurred, the immediate history of the situation in which it occurred—it is not wholly unreasonable to conclude that the room for error in his perception and evaluation of the incident is slight and that intermediate procedures may be dispensed with. Practical common experience affords no such support for a similar conclusion with respect to the room for error in perception and evaluation by a large group of human beings, whether judges, legislators, or others. The physical contours of most legislative chambers, the comings and goings of the members, and the diffusion of attention of the members, among many factors, render it improbable that all of the members present would share a uniform perception and evaluation of an incident, upon the basis of which each member might then decide upon an appropriate response. This would be true even at a moment when the legislature is actively in session, discussing the business before it, and more true at times at which it is commencing or terminating its work. The question is not whether these attributes of a legislature altogether prevent it from imposing a jail sentence upon a contemnor. The question is whether these attributes so distinguish a legislature from a court that the legislature must be pre-

vented from visiting such punishment upon a contemnor with such swiftness and abruptness. I conclude that the room for error inherent in the response of a large group is so great as to require that it observe some minimal procedures before it invokes this power.⁸

There are other reasons which lead me to this conclusion.

Unlike many courts of record, frequently if not typically no verbatim written record of legislative proceedings exists. If the availability of judicial review of the contempt citation is assumed, it would nevertheless be severely crippled by the absence of a definitive record of the incident.

Moreover, the nature of available judicial review is extremely unclear. In its opinion in the present case, the Supreme Court of Wisconsin stated (44 Wis. 2d at 297):

We do not hold the action of the legislature is not reviewable in our courts and subject to correction. It is expressly provided in sec. 13.27, Stats., the contemnor may be discharged before his time by "the due course of law." The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense. We think due process is satisfied when the courts are open to determine promptly any ques-

⁸Perhaps similar considerations may affect the summary powers of courts consisting of more than one judge. However this may be, there remains a significant contrast between a court consisting of nine members, and the Wisconsin Assembly consisting of one hundred.

tion concerning the merits of a contempt found to have been committed by summary process before a legislature for contempt committed in its presence.

And the court stated further (at 299):

The only practical way a contempt in the presence of the legislature can be handled is by summary process reviewable by the judiciary. We think it is neither a necessary nor an acceptable construction of the constitution that a trial or a hearing be engrafted upon the legislative contempt power when the judiciary will immediately review the action of the legislature and has the power to grant adequate and appropriate relief.

Although this statement is somewhat surprising in the light of the limitations upon the historic function of the writ of habeas corpus,⁹ I am bound to accept it as an authoritative statement that one who has been imprisoned by the legislature for contempt of the legislature may obtain from a Wisconsin court a review of the "merits" of the legislative action. However, the nature and extent of this review is not explained. It is not clear whether the accused is entitled to a trial de novo on the underlying factual issues relating to his conduct, or whether the review is comparable to judicial review of an administrative deci-

⁹In *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), in a habeas corpus proceeding to test the lawfulness of a confinement imposed by the Assembly, the Court stated (at *639) that it had no appellate power over the Assembly when the Assembly had acted within its jurisdiction, and that the Court could not "suspend [the Assembly's] judgment because it has made a mistake or abused its discretion in the premises." In *State ex rel. Reynolds v. County Court*, 11 Wis. (2d) 560, 573 (1960), it was emphasized that in Wisconsin, even with respect to contempt of court, habeas corpus is "restricted to the question of the jurisdiction of the committing court" and that errors "in the exercise of jurisdiction" are not reviewable. See 39 Am. Jur. 2d, Habeas Corpus, § 28, pp. 198-201.

sion, or whether the burden of persuasion rests with the accused petitioner or with the respondent. If there is indeed to be a review of the "merits", it appears that a trial of the facts would be necessary, since no trial has as yet occurred, and since there is no written record of the underlying events to which a court might look. Assuming, however, that these difficult matters could be resolved satisfactorily, the initial injustice would not be reached; the hearing, whatever it may be, would be afforded after the imposition of the punishment and not before.¹⁰

I do not consider that affording petitioner some minimal opportunity to appear and to respond to a charge would constitute an undue burden on the legislature. The proceeding would probably resemble the contempt proceedings in the United States Congress discussed in *Kilbourn v. Thompson* and *Jurney v. MacCracken*, *supra*, in which the accused was ordered to appear before the bar of the House or Senate and to show cause why he should not be punished for contempt.¹¹

In its opinion denying habeas corpus to this petitioner, the Supreme Court of Wisconsin expressly declined to draw an analogy between courts and legislatures with respect

¹⁰Bail was refused to this petitioner both by the Circuit Court for Dane County and the Supreme Court of Wisconsin. In an appeal from a conviction for contempt of court, sentence may be stayed and bail granted. *Sacher v. United States*, 343 U. S. 1, 12-13 (1952). On the other hand, bail is rarely granted in habeas corpus proceedings. *United States ex rel. Epton v. Nenna*, 281 F. Supp. 388 (S.D.N.Y. 1968).

¹¹The report of *In re Falvey and Kilbourn*, 7 Wis. *630 (1858), involving a contempt of the Wisconsin legislature, reveals (at *633-634) that the alleged contemnor was arrested on February 9, "arraigned before the said Assembly" on February 10, that the Assembly "thereupon" declared him to be in contempt, that he prayed to be heard by counsel in answer (which was refused), that he gave an answer in writing ("which the Assembly declared by resolution to be insufficient"), and that on February 11 the Assembly resolved that he was to be confined for ten days.

to the power to punish direct contempt. 44 Wis. 2d at 295. The Court summarized the distinction between the two powers as follows (at 296):

Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is punishment necessary to maintain the dignity, decorum, and respect for the court. This objective admittedly is also found in punishment for some crimes. In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body.

Whatever the validity of this view in terms of the sources and early history of the contempt power, or in terms of justifications for its existence, I cannot agree that it accurately describes the uses of the power. On the one hand, courts impose sanctions for contempt for the purpose of preventing further interference with their function, as well as for the purpose of punishing the offender for a completed act. For example, in *Fisher v. Pace*, 336 U. S. 155 (1949), the trial judge interrupted a lawyer who had persisted in making improper argument to the jury, and ordered him to be removed immediately from the courtroom and placed in jail. Indeed, in *Sacher v. United States*, 343 U. S. 1, 10 (1952), in discussing whether a court might summarily punish a lawyer during a trial or await the trial's end, the Court said that "[t]he overriding consideration

is the integrity and efficiency of the trial process. . . .” On the other hand, legislatures impose sanctions for the purpose of punishing for a past deed, as well as for the purpose of preventing further interference with the legislative function. In *In re Falvey and Kilbourn*, 7 Wis. *630, 634 (1858), the Assembly sentenced the contemnor to jail for ten days “as punishment for the contempt . . . in failing to appear before the joint investigating committee.” In *Jurney v. MacCracken*, 294 U. S. 125, 147-150 (1935), it was pointedly held that a legislature may impose punishment for contempt solely as punishment, after the legislative obstruction has been removed, or after the removal of the obstruction has become impossible. Moreover, in the present case, the resolution was adopted by the legislature two days after the acts complained of, and without a hearing even for the purpose of determining how long a period of confinement would be necessary to prevent the petitioner from causing further obstruction of the legislative function.

For the reasons stated, I conclude that the petitioner has been denied procedural rights guaranteed him by the due process clause of the Fourteenth Amendment, and that he is entitled to the relief he seeks.

Bill of Attainder

Petitioner contends that the procedure whereby he was imprisoned constitutes a bill of attainder or a bill of pains and penalties. Art. I, § 10, clause 1, of the Constitution provides: “No State shall . . . pass any Bill of Attainder. . . .” A bill of attainder is a legislative act sentencing a person to death for an alleged crime without a judicial trial, while a bill of pains and penalties imposes some mild-

er punishment. Both types are included in the constitutional prohibition on bills of attainder. Black's Law Dictionary 162 (4th ed. 1951).

In view of the conclusion I have reached, that petitioner is entitled to be released because he has been denied procedural due process, it is not strictly necessary to consider his contention with respect to attainder. However, if his contention in this respect were to be upheld, it might be that the legislature would be wholly deprived of power to impose punishment upon a contemnor, with or without due process. To make clear that I intend no such consequence, I add these comments.

There is some similarity between bills of attainder, which constitute punishment by a legislature without judicial safeguards, and legislative contempt judgments, which can also constitute punishment by a legislature without most judicial safeguards. However, the legislative contempt power has a long history, has been upheld numerous times during that history, *Jurney v. MacCracken*, *supra*, 294 U. S. at 148-150, and has never been limited or denied because it allegedly violates the constitutional prohibition against bills of attainder. The bill of attainder defense to legislative contempt citations "has not been seriously accepted by the Supreme Court, though Justices Black and Douglas have consistently raised the point in dissent." R. Goldfarb, *The Contempt Power* 223 (1963). See *Barenblatt v. United States*, 360 U. S. 109, 153 *et seq.* (1959) (dissenting opinion).

I conclude that the prohibition on bills of attainder, on the one hand, and the legislative contempt power, on the other, have been permitted by the Supreme Court of

the United States to co-exist for so many years that I am not free now to hold that the survival of the first demands the extinction of the second.

Right To a Jury Trial

The petition here does not assert specifically that custody is unlawful because petitioner was deprived of a jury trial. However, it does allege that he was denied the right to a trial or hearing of any kind; the right to a jury trial was asserted in oral argument; and the Supreme Court of Wisconsin expressly considered whether petitioner had been entitled to a jury trial and decided that he had not. 44 Wis. 2d 298-299. I consider that petitioner has exhausted his state remedy with respect to the jury trial issue, and that he has sufficiently asserted it here. However, I express no opinion with respect to the merits of this contention.

I have concluded that in every case of contempt of the legislature, certain minimal requirements of procedural due process must be observed before the contemnor may be imprisoned. I do not consider these limitations upon the legislature oppressive. First, the minimal requirements of procedural due process can readily be provided with little delay. Second, the ability of the legislature to protect its proceedings from disruption lies primarily in its undoubted power to expel any disrupter immediately, and to employ appropriate police action to prevent further disruption.

ORDER

For the reasons stated above, and on the basis of the entire record herein, the petition for habeas corpus is hereby granted and respondent's motion to dismiss is hereby denied. The order of October 11, 1969, releasing petitioner on bail is vacated, and it is hereby ordered that petitioner be released from any further custody or restraint pursuant to the resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969.

Entered the 8th day of April, 1970.

By the Court:

JAMES E. DOYLE

District Judge

41a

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

OCTOBER TERM, 1970, FEBRUARY 17, 1971

Civil Action File No. 69-C-241 (H-C)

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,

Respondent.

JUDGMENT

This action came on for hearing before the Court, the Honorable JAMES E. DOYLE, United States District Judge, presiding, upon the Mandate of the United States District Court for the Seventh Judicial Circuit, entered on the 11th day of February, 1971, and filed herein on the 17th day of February, 1971; and the Court having entered its Direction to Enter Judgment herein pursuant to said Mandate:

IT IS ORDERED AND ADJUDGED: That the petitioner's petition for a writ of habeas corpus be and it hereby is denied; that respondent's motion to dismiss the petition be and it hereby is granted; that said petition for a

writ of habeas corpus be and it hereby is dismissed; and that costs be taxed in favor of respondent and against petitioner.

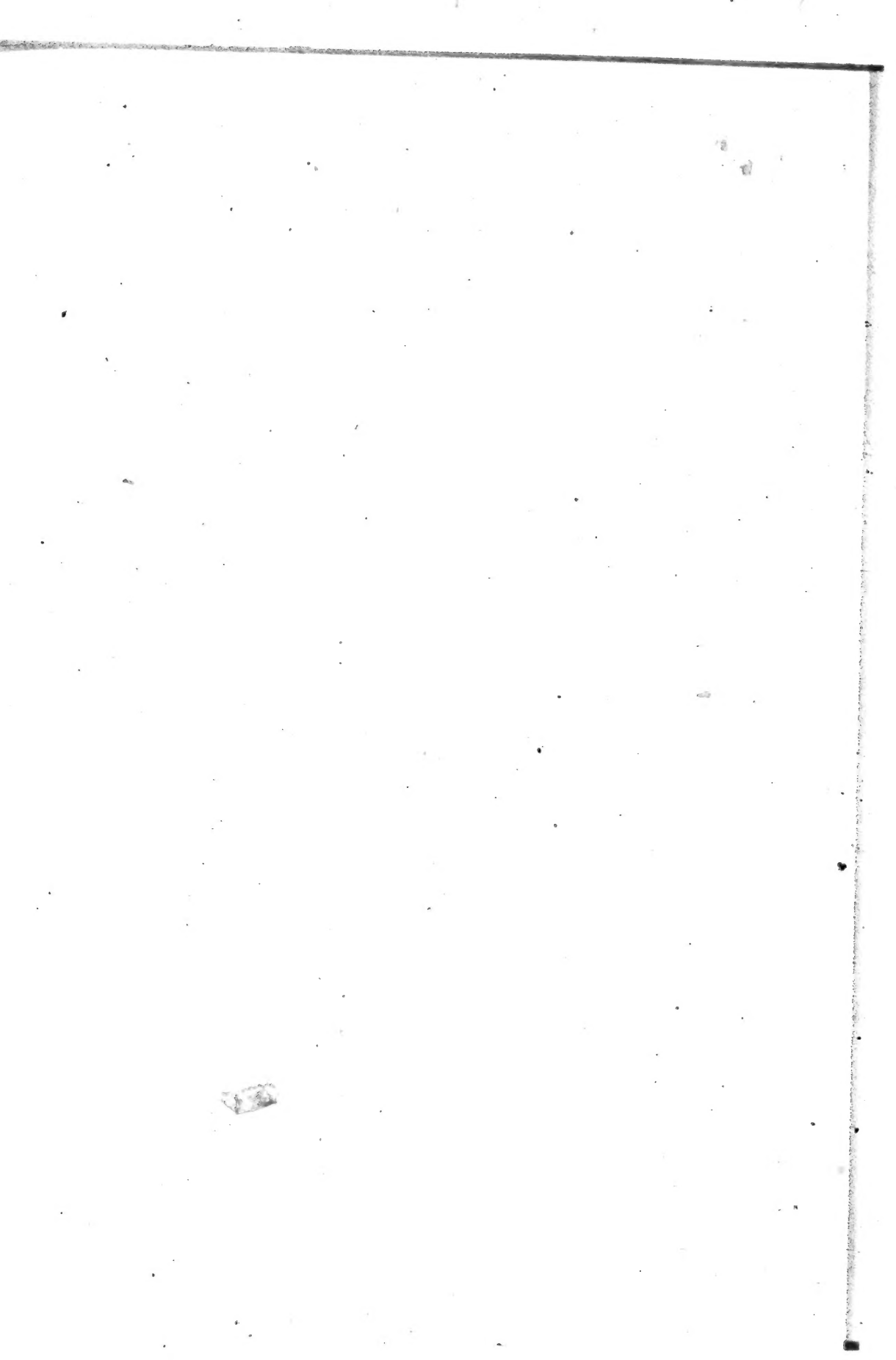
Dated at Madison, Wisconsin, this 17th day of February, 1971.

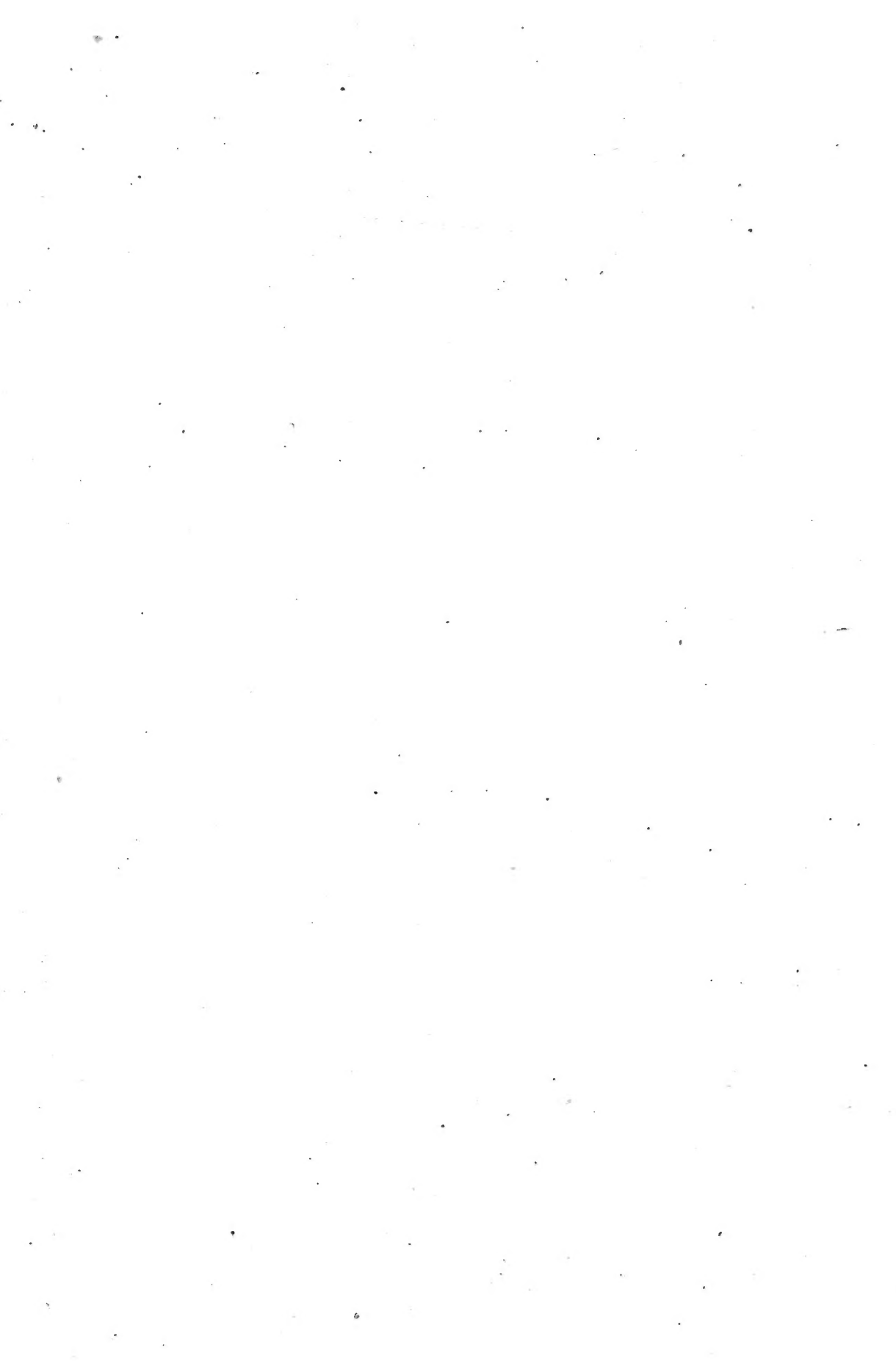
(s) JOHN R. ADAMS
Clerk of Court

A TRUE COPY, Certified this 17th day of February, 1971.

JOHN R. ADAMS, Clerk

By John R. Adams
Clerk





CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.

FILED

MAY 20 1971

E. ROBERT WARREN, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

~~No. 1549~~

70-112

JAMES E. GROPP, *Petitioner,*

v.

JACK LESLIE, Sheriff of
Dane County, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT W. WARREN

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114 East, State Capitol
Madison, Wisconsin 53702

No. 1549

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1549

JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, Sheriff of
Dane County,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

On October 1, 1969, the State Assembly of Wisconsin passed a resolution reciting that petitioner Groppi had led a gathering of people onto the floor of the Assembly two days earlier (September 29, 1969) and that petitioner's conduct in so doing violated an Assembly rule and prevented the Assembly from conducting its business. The resolution found that petitioner's conduct constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and further found the petitioner

to be in contempt of the Assembly, said contempt being punishable by the Assembly under Article IV, Section 8 of the Wisconsin Constitution and sec. 13.26 (1) (b) of the Wisconsin Statutes. Petitioner Groppi was arrested on the same day the resolution was passed and imprisoned in the Dane County, Wisconsin, jail pursuant to the direction of the resolution that he be imprisoned for a period of six months or for the duration of the then current session of the legislature, "whichever is briefer."

The contempt resolution was passed and carried into execution without formal notice served on the petitioner and without his presence at or participation in any of the proceedings of the Assembly leading thereto.

Within forty-eight hours after his arrest and confinement, petitioner commenced a civil action in the United States District Court for the Western District of Wisconsin for a declaratory judgment of the constitutionality of Wisconsin Statutes, secs. 13.26 and 13.27, pursuant to which the Assembly had acted in imprisoning him for contempt. He sought a temporary restraining order in connection therewith, the effect of which would be to release him from confinement pending determination of the merits of the declaratory judgments action.

On Monday, October 6, 1969, the District Court denied the motion for a temporary restraining order on the ground that it would be the equivalent of a writ of habeas corpus which the District Court had no power to issue before petitioner's state remedies had been exhausted. On the same day, a petition for a writ of habeas corpus in petitioner's behalf was filed in Dane County Circuit Court, which ordered the filing of a response and a hearing on the issues the following morning, Tuesday, October 7. Following the hearing in Circuit Court, the matter was taken under advisement; petitioner's

attorneys filed a petition for bail and for leave to commence an original action for a writ of habeas corpus in the Wisconsin Supreme Court without waiting for the determination of the Circuit Court.

On Wednesday, October 8, 1969, the Dane County Circuit Court entered an opinion and order denying the petition therein for a writ of habeas corpus and petitioner's attorneys on the same day filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The District Court immediately issued an order requiring a response to the petition to be filed within three days, even though the Wisconsin Supreme Court had not yet heard arguments.

On Friday, October 10, 1969, the Wisconsin Supreme Court, having earlier granted petitioner leave to amend his petition for a writ of habeas corpus in that court, heard oral arguments on the petition and took the case under advisement. Later in the same day, the Wisconsin Supreme Court issued an order denying the petition. The response to Father Groppi's federal petition was filed on the following day, Saturday, October 11, 1969, and petitioner was admitted to bail by the District Court within hours thereafter.

Petitioner remained free on bail until April 8, 1970, when he was discharged from custody on the order of the District Court. His challenge to the constitutionality of the statutes under which the Wisconsin Assembly had acted (secs. 13.26 and 13.27, Wis. Stats. 1967) was rejected the same day by a three judge district court. (*Groppi v. Froehlich*, W. D. Wis. 1970, 311 F. Supp. 765).

Respondent appealed from the judgment in *habeas corpus*, and on October 28, 1970, the Court of Appeals for the Seventh Circuit reversed. Following an *en banc* rehearing,

the earlier reversal was upheld, three judges dissenting, on January 6, 1971. The regular 1969 session of the legislature of Wisconsin had ended two days earlier, on January 4, 1971, terminating all threat of petitioner's imprisonment under the contempt resolution.

ARGUMENT

The petition paints the decision of the Court of Appeals in lurid colors, claiming it represents a radical departure from traditional notions of due process and a new grant of despotic power to the legislative branch.

There has been no departure, and no new power has been granted. The Court of Appeals was merely willing to recognize what the District Court could not: that a legislative body must have—and always has had—the power possessed by all courts to impose summary punishment for an act of disruptive contempt committed in its immediate view. That petitioner may have been unaware of the existence of this power does not make its exercise unconstitutional.

To achieve a better perspective of the narrow issue involved in this controversy, it should be kept firmly in mind that:

1. Both the District Court and the Court of Appeals recognized—and petitioner has not disputed—that the Wisconsin Assembly is a house having authority to commit for contempt.
2. The District Court expressly acknowledged that if the conduct described in the contempt resolution “had occurred in a courtroom in the presence of a judge” summary punishment for contempt would have been permissible under the Constitution. (Appendix pp. 29-30)

3. Among the many courts which have heretofore recognized and upheld the contempt powers of legislative bodies (see cases collected in *Jurney v. MacCracken*, (1935) 294 U. S. 125, 79 L. ed. 802, 55 S. Ct. 375), not one has ever suggested that those bodies should be less able than courts to act expeditiously in vindication of their legally vested authority when that authority is challenged by physically disruptive conduct in the immediate view of the house.

Seen in this perspective, the decision of the Court of Appeals, carefully limited as it was, was clearly correct.

Petitioner's claim of a vague "right to be heard" or "right of allocution" prior to commitment for a *direct* contempt is not supported by the citation of a single contempt case. Not *one* of the 12 cases cited at pages 8-9 of the Petition for Certiorari holds that there is a constitutional right to hearing or allocution in cases of contempt committed in the face of a tribunal having power to commit.

The petition ignores, on the other hand, language in decisions of this court which has invariably recognized the necessity for and propriety of summary punishment under certain well defined circumstances: *Ex Parte Terry*, (1888) 128 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77; *Ex Parte Hudgings*, (1919) 249 U. S. 378, 63 L. ed. 656, 39 S. Ct. 337; *Cooke v. United States*, (1925) 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390; *In Re Oliver*, (1948) 333 U. S. 257, 92 L. ed. 682, 68 S. Ct. 499; and *Fisher v. Pace*, (1949) 336 U. S. 155, 93 L. ed. 569, 69 S. Ct. 425.

Respondent concedes—as it always has conceded—that a contempt committed *outside* the presence of a court or other tribunal is punishable only after notice and hearing. Indeed, all of the reported cases of congressional contempts appear to have been indirect, save possibly one—*Ex Parte Nugent*,

(1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10,375—where the court acknowledged the power of the Senate to pronounce a judgment of contempt while in secret session, the report of the decision being silent as to whether the contemnor was given an opportunity “to be heard.”

The Court of Appeals correctly refused to find an abridgment of petitioner's constitutional rights from the circumstance that the Wisconsin Assembly did not condemn until Wednesday an act of contempt committed on Monday. Certainly the Assembly could not be expected to act on September 29, 1969 while its chambers were occupied by petitioner and his followers. There is nothing in this record to suggest that the Assembly was *able* to organize and conduct business any sooner than it did, on October 1, 1969, or that the interval between the ending of the contumacious conduct and the adoption of the contempt resolution constituted unreasonable delay.

Mayberry v. Pennsylvania, (1971) — U. S. —, 27 L. ed. 2d 532, 91 S. Ct. 499, is not authority for the proposition that a 48-hour delay between contempt and judgment is fatal. The mere passage of time, it is submitted, has never been held to bar summary imposition of sanctions for direct contempt. *Sacher v. United States*, (1952) 343 U. S. 1, 96 L. ed. 717, 22 S. Ct. 451; *Ex Parte Terry*, (1888) 128 U. S. 289, 32 L. ed. 405, 9 S. Ct. 77; *In Re Maury*, (9 Cir. 1913) 205 F. 626.

Subsequent
 [redacted] to the filing of Circuit Judge Kiley's dissent following the *en banc* rehearing in the Court of Appeals, petitioner has seen fit to suggest—for the first time—that the contempt resolution was constitutionally infirm because of an inadequate statement of “underlying facts.” It is difficult to understand how a resolution which recites that

“... James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10, prevented the Assembly from conducting public business and performing its constitutional duty...”

could reasonably be said to set forth only a legal conclusion. It is perhaps enough of an answer to petitioner to note that neither the District Judge nor six of the seven Circuit Judges felt the resolution was insufficient in its recital of the facts. In any event, however, the only case which has heretofore examined this question held that “the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.” *Ex Parte Nugent*, (1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10, 375.

The issues sought to be raised by petitioner are more interesting than important. Legislative contempts of the variety here under discussion are historical rarities, if the paucity of cases is any fair indication. This is particularly true where, as here, the contempt was “direct”—i.e., disorderly conduct committed in the immediate view of the legislative body which pronounced the judgment of contempt. It is unlikely, therefore, that the well-being of the republic or the safeguarding of individual rights rests to any considerable degree on the resolution of these issues.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT W. WARREN

Attorney General of Wisconsin

SVERRE O. TINGLUM

Assistant Attorney General

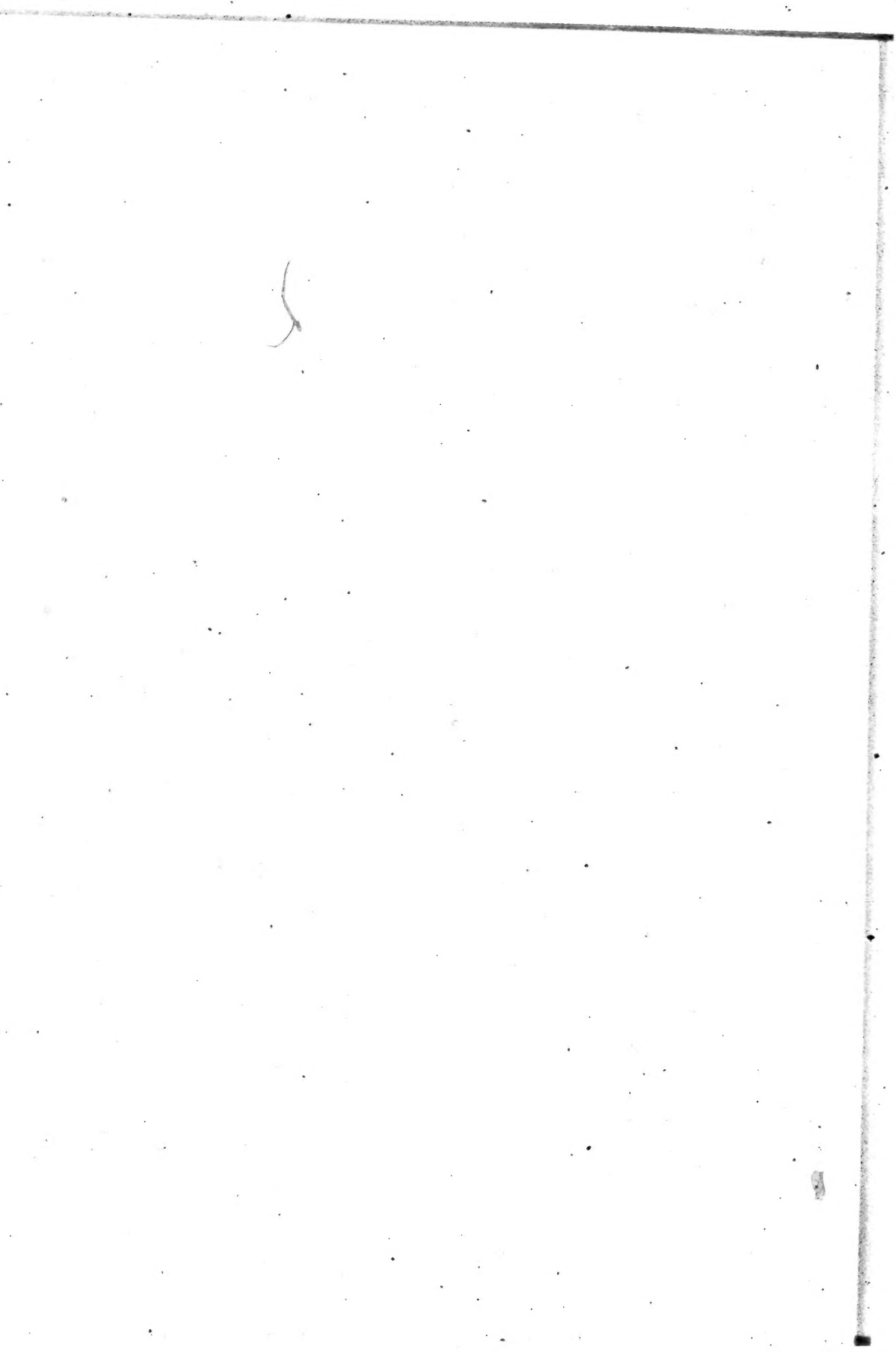
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Madison, Wisconsin 53702



In The
SUPREME COURT of the UNITED STATES

October Term, 1970



JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE,
Sheriff of Dane County,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In The
SUPREME COURT of the UNITED STATES

October Term, 1970

No. 1549

JAMES E. GROPPi,

Petitioner,

v.

JACK LESLIE,
Sheriff of Dane County,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals on re-hearing *en banc* is reported at 436 F. 2d 331 (1971), and printed in the Appendix, pp. 70a-79a. The opinion of the United States Court of Appeals is reported at 436 F. 2d 326 (1970), and printed in the Appendix, pp. 80a-88a. The opinion of the United States District Court, Western District of Wisconsin is printed at 311 F. Supp. 772 (1970), and printed in the Appendix, pp. 91a-108a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit after re-hearing *en banc* was entered on January 6, 1971. The Petition for a Writ of Certiorari was filed on April 6, 1971, and granted on June 7, 1971. — U. S. —, — S. Ct. —, 29 L. Ed. 2d 679 (1971). The jurisdiction of this Court rests on 28 U. S. C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 8, Wisconsin Constitution
Rules; contempts; expulsion

Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with concurrence of two-thirds of all members elected, expel a member, but no member shall be expelled a second time for the same cause. (Wis. Stats. 1967, p. 35).

STATUTES INVOLVED

Sec. 13.26 Wisconsin Statutes

Contempt

(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

* * *

(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

* * *

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature. (Chp. 13, Wis. Stats., 1967, p. 202).

Sec. 13.27 Wisconsin Statutes

Punishment for Contempt

(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane County jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County, and may be fined not more than \$200 or imprisoned not more than one year in the county jail. (Wis. Stats. 1967, p. 202).

QUESTIONS PRESENTED

1. Whether a legislative body can, consistent with due process of law, two days after alleged contemptuous conduct, *ex parte* imprison a person under its contempt power without giving the person any notice of the charge against him or any opportunity whatsoever to appear before the legislative body and respond to the charge.

2. Whether consistent with due process of law a person can be found in contempt of a legislative body when the legislative contempt resolution sets forth mere conclusions and fails to set forth any underlying facts or circumstances which constituted the alleged contemptuous behavior.

STATEMENT OF THE CASE.

On October 1, 1969, the Assembly, one of two houses of the State of Wisconsin Legislature, passed the following resolution:

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane County Jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 Regular Session of the Wisconsin Legislature in violation of Assembly Rule 10, prevented the Assembly from conducting public business and performing its constitutional duty; now therefore be it

Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the House and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes, and Article 4, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Section 13.26 and 13.27 of the Wisconsin Statutes orders the imprisonment of James E. Groppi for a period of six months or for the duration of the 1969 Regular Session, whichever is briefer in the Dane County Jail and directs the Sheriff of Dane County to seize said person and deliver him to the jailer of the Dane County Jail; and be it further

Resolved, That the Assembly directs a copy of this resolution to be transmitted to Dane County District

Attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and be it further

Resolved, That the Attorney General is respectfully requested to represent the Assembly in any litigation arising therefrom.

Subsequently a copy of the Resolution was served on Groppi and he was imprisoned in the Dane County Jail. Groppi was never served with a copy of the Resolution prior to his imprisonment and was afforded no specification of the charge against him, no notice and no hearing. The Circuit Court for Dane County dismissed Groppi's application for a Writ of Habeas Corpus as did the Wisconsin Supreme Court. *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192 (1969).

After the Dane County Circuit Court denied Groppi's petition, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Western District of Wisconsin pursuant to Sec. 1254, T. 28, U. S. C. Groppi was admitted to bail by the District Court after the Wisconsin Supreme Court denied his petition. At that time he had served ten days of the sentence imposed by the Assembly under the Resolution.

On April 8, 1970, the District Court held the Assembly could not summarily impose a jail sentence for legislative contempt without first providing Groppi with some "minimal opportunity" to appear and to respond to the charge. Accordingly, the Court granted the Writ of Habeas Corpus and ordered that Groppi be released from any further custody or restraint pursuant to the Resolution. *Groppi v. Leslie*, 311 F. Supp. 772 (W. D. Wis. 1970).

On October 28, 1970, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and directed that an order be entered denying Groppi's petition for habeas corpus and granting the Respondent Sheriff's motion to dismiss. *Groppi v. Leslie*, 436 F. 2d 326 (1970). Subsequently, the Court of Appeals granted Groppi's petition for a rehearing *en banc* and in a four to three decision affirmed the Court's decision of October 28, 1970. *Groppi v. Leslie*, 436 F. 2d 331 (1971).

Prior to the passage of the contempt resolution by the Wisconsin Assembly, the Attorney General for the State of Wisconsin had obtained a temporary restraining order in the Circuit Court for Dane County enjoining Groppi from entering the Capitol Building which housed the Assembly. Subsequently, on October 17, 1969, the Circuit Court for Dane County vacated the temporary restraining order and denied the Attorney General permanent relief finding that there was no evidence that there would be any further disturbances of the Wisconsin Assembly by Groppi.

In addition to the penalties imposed in the contempt resolution, Groppi was charged with disorderly conduct by the District Attorney for Dane County, Wisconsin for his role in the incident mentioned in the contempt resolution. A jury trial was held in the County Court for Dane County, Wisconsin, on that charge and the petitioner was discharged by the Court after the jury was unable to reach a verdict.

SUMMARY OF ARGUMENT

The decision of the Court below has for the first time in the history of jurisprudence held that a legislative body can imprison an individual for six months without giving him any notice of the charge against him or any opportunity to respond thereto. Even a Court exercising its summary contempt power could not imprison an individual in the way the Wisconsin Assembly imprisoned petitioner herein. *United States v. Galante*, 278 F. 2d 72, 78 (C. A. 2, 1962) (Judge Friendly dissenting). The political and physical differences between a court and a legislative body are strong reasons to not extend the summary contempt power of the judiciary to legislative bodies. The two day delay between the alleged contemptuous incident and the finding of contempt by the legislature was such as to deny the legislature the right to imprison petitioner without notice or any hearing. *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); *Johnson v. Mississippi*, — U. S. —, 91 S. Ct. —, 29 L. Ed. 2d 423 (1971). The conclusionary nature of the contempt resolution makes it constitutionally deficient since it fails to state the underlying facts and makes it impossible to obtain any meaningful review of the contempt finding. *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1924); *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

I. THE WISCONSIN LEGISLATURE DID NOT HAVE THE POWER TO SUMMARILY PUNISH FOR CONTEMPT.

The contempt powers of courts and legislatures have a common source in the divine right of the monarchy which exercised absolute and unchallenged authority. The legislative power of contempt emerged at a time when the House of Commons performed judicial as well as legislative functions. See Goldfarb, *The Contempt Power*, 25-36 (1963).¹ In addition, the exercise of contempt power has been justified as inherent within a legislative body because the power is necessary to protect its authority. While these historical factors establish the existence of a contempt power on the part of the legislative body, they do not answer the question of the proper procedural requirements so that the legislative contempt power is exercised in accord with due process. The summary powers of courts have been limited to those situations where the misconduct was actually observed by the Court and where immediate punishment was necessary to restore order and maintain the dignity and authority of the court. *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767; *Harris v. United States*, 382 U. S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240. Because of the dangers inherent in the summary contempt power, this Court has construed the power as an exception to the normal requirements of due process and have refused to extend it. *Johnson v. Mississippi*, — U. S. —, 91 S. Ct. —, 29 L. Ed.

¹The author, however, challenges the need for either judicial or legislative contempt powers since Latin American and European governmental systems exist, and survive, without such power. He also questions the consistency of contempt power with our present philosophical concept that sovereignty resides in the people. Further, he questions whether legislative contempt power is justified today when legislatures no longer exercise judicial powers.

2d 423 (1971); *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). The summary contempt power has been described as "perhaps nearest akin to despotic power of any power existing under our form of Government." *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8 (1897). Good reasons exist for not extending that power to legislatures.

First, courts differ significantly from legislatures. It is the business of judges to decide particular cases. As Judge Stevens stated in his dissenting opinion on the rehearing *en banc* in this matter,

Without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic than are judges. *Groppi v. Leslie*, 436 F. 2d 331 at p. 335, App. p. 75a-76a.

In *Johnson v. Mississippi*, *supra*, it was held that a judge "was so enmeshed in matters involving" a defendant "as to make it most appropriate for another judge to sit. Trial before an 'unbiased judge' is essential to due process." — U. S. —, 91 S. Ct. —, 29 L. Ed. 2d 423, 427. In the instant case, the Assembly certainly cannot be viewed as an "unbiased judge". The demonstrators who entered the Assembly chamber did so to protest the legislative action of the Assembly with regard to welfare cut-backs. The responsiveness of legislators to external pressures, coupled with the fact of a direct attack upon their actions, clearly so enmeshed the members of the Assembly as to make detached and unbiased judgment impossible.

Second, the physical contours of most legislative cham-

bers, along with the nature of legislative sessions, and the absence of transcribed records of legislative proceedings, make it reasonable to believe that the room for error in perception and evaluation of the alleged contumacious conduct is far greater before a legislative body than before a Court in the restricted area in which a Court may make a summary contempt finding, and review of any action taken is much more difficult. In the instant case, as Judge Doyle of the District Court pointed out, a question arises whether "all of the essential elements of the misconduct occurred under the eye of the members of the assembly." (App. p. 99a). There is no indication in the resolution as to how many members of the Assembly that voted for the Resolution were in fact present two days earlier and observed the alleged contemptuous conduct. If the conduct was not observed by those voting, the parallel to a court's summary powers is destroyed. The absence of any record as to who viewed the conduct makes the review of a conviction for summary legislative contempt unavailable or of such limited scope as to be futile. And yet, without judicial review there can be no check on the caprice or arbitrariness of the legislative body. If review is limited to a determination of the technical adequacy of the contempt resolution, such review is essentially worthless. If the reviewing court is to go beyond the resolution and look to the underlying facts, it is impossible to see how the court can make any factual determination. *Groppi v. Leslie*, 311 F. Supp. 772 (W. D. Wis. 1970, (App. p. 91a.))

As an example of this problem, the facts given by the Wisconsin Supreme Court in its denial of petitioner's request for habeas corpus relief was based on a review of the

facts as described by the news media.² The Wisconsin Supreme Court denied petitioner's motion for rehearing—a rehearing requested in order to clarify the procedure for judicial review of the legislative action. The denial of the petition for rehearing was made without any opinion by the Wisconsin Supreme Court. (App. p. 65a.)

Third, most foreign legislative bodies function without this power and American legislatures have functioned to date without this summary power. See Goldfarb, *The Contempt Power*, 25-36 (1963). Nothing prevents the removal from the legislature of persons obstructing the legislative activity. *Illinois v. Allen*, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *Mayberry v. Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), (concurring opinion, Mr. Chief Justice Burger). Many other laws, including disorderly conduct and unlawful assembly, were and are available if the legislature determines that following due process is too burdensome. In the instant case, petitioner in addition to being cited for contempt was also charged with disorderly conduct in the County Court for Dane County, Wisconsin.³ The fact that our legislatures, national and State, have survived and prospered to date without the power to imprison for contempt without notice and hearing is reason enough not to extend such a grave and dangerous power to them. The reasoning that in this age of "the politics of confrontation" such a power is necessary

²The Wisconsin court held the action of the legislature was reviewable, *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192, 197 (1969), a surprising holding in light of earlier decisions. See Judge Doyle's opinion, *Groppi v. Leslie*, 311 F. Supp. 772, 779, n. 9, (W. D. Wis. 1970).

³A jury trial was held in the County Court for Dane County, Wisconsin, on the charge that petitioner was in violation of the disorderly conduct statute of the State of Wisconsin. At the trial the petitioner was discharged after the jury was unable to reach a verdict.

to preserve the orderly processes of government exhibits a failure to recognize that our Constitutional form of Government was intended to survive and has, in fact, survived perilous and tense times. The framers of the Constitution drafted it to guarantee that no man, despite the political climate of the country, would be subjected to imprisonment without an opportunity to know and respond to the charges against him. Father Groppi does not ask that this Court be "unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country". (Judge Pell, App. p. 83a). But, Father Groppi does ask that he be accorded the same procedural rights that others who have allegedly been involved in such disruptions have been granted, by courts, namely, notice and an opportunity to respond. Being mindful of these disruptions does not mean or require a neglect of those rights promised each citizen by the Constitution.

II. ASSUMING SUMMARY CONTEMPT POWER RESIDES IN LEGISLATIVE BODIES, THE INSTANT CASE IS NOT, FACTUALLY, AN APPROPRIATE ONE FOR THE EXERCISE OF THIS POWER.

In *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 5 L. Ed. 242 (1821), the foundation for recognition of legislative contempt power in the United States, the contempt authority was limited to "the least possible power adequate to the end proposed". 19 U. S. (6 Wheat.) 204, 5 L. Ed. 242. This maxim has often been cited and repeated in dealing with legislative contempts. See Wright, *Federal Practice and Procedure*, Rule 42, Section 702, pp. 146-154. The important question in light of this limitation becomes what end the Wisconsin As-

sembly was seeking in citing Father Groppi for contempt. The Assembly Resolution is couched in terms that indicate plainly the body was seeking to punish a past offense. Father Groppi, according to the Resolution, was to be punished for having invaded the Assembly's Chambers two days earlier. The fact that the Assembly sought to punish past conduct, as opposed to present or threatened conduct, destroys any justifiable reason for the use of summary proceedings, for the desired end could have been obtained by use of Wisconsin's criminal laws and procedure.

At the time of the Resolution's passage, the alleged obstruction or disruption of the Assembly had ceased. The throng had left the legislative chamber, and there is no indication anywhere in the record that a recurrence of any disruptive conduct was imminent or even threatened. The Attorney General had obtained a temporary restraining order to forestall a recurrence. In light of these facts, the actions of the Assembly, in summarily dealing with Father Groppi, evidence an inappropriate exercise of summary power even if such a power is found to reside in the Assembly.

The Wisconsin Supreme Court, in denying Father Groppi habeas corpus relief, distinguished between judicial and legislative contempt. Contrasting the legislative power of contempt with that of the courts, the Supreme Court said:

Under the judicial contempt power, a contemnor is imprisoned, not to prevent him from continuing to interfere with the judicial function of the court in the future but to punish him for having completed a contemptuous act in the presence of the court. This is punishment necessary to maintain the dignity, decorum, and respect

for the Court. This objective admittedly is also found in punishment for some crimes. *In contrast, the legislative power of contempt, restricted as it is to prevent the contemnor from interfering with the functions of the legislature, is more in the nature of what is known as civil contempt. Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body. State ex rel. Groppi v. Leslie, 44 Wis. 2d 282 at 296, 171 N. W. 2d 192 (1969). (Emphasis supplied) (App. p. 121-22a).*

The wording of the Assembly Resolution being such that it deals only with past conduct, the exercise of contempt power in the instant case flies in the face of what the Wisconsin Supreme Court defined as the function of legislative contempt power. According to the Wisconsin Court, legislative contempt power is a deterrent and is not intended as a means of punishment. Both the District Court (App. p. 91a) and the three judge panel of the Seventh Circuit (App. p. 80a) rejected this characterization and saw the contempt sentence as a criminal contempt—a punishment. According to these federal courts the proper characterization of the power is that expressed in *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1910).

... for criminal contempt the sentence is punitive, to vindicate the authority of the court. ... 221 U. S. 418, 441.

But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punish-

ment, but is intended to be remedial by coercing the defendant to do what he had refused to do. 221 U. S. 418, 442.

See also: Wright, *Federal Practice and Procedure*, Rule 42, Section 704, pp. 146-154. Father Groppi had not been ordered to do anything; he had not refused to do anything; he could not free himself by any action on his own part; he did not have the key to his own cell. The action on the part of the Assembly clearly, then, cited Father Groppi for criminal contempt, a citation the Wisconsin Court claimed the Assembly was powerless to pass. The Wisconsin Court's claim that the imprisonment was intended as a deterrent is without any rational support.

The idea of summary contempt arose, and is generally supported as a creature of necessity. According to a large body of authority, courts must on occasion, when provoked by unseemly conduct, retaliate in order to vindicate the dignity of the tribunal. The majestic functioning of the courts must not be slowed or stopped by obstructive or disruptive behavior. Hence, it is argued the courts must, of necessity, possess a contempt power. The State contends that such a power is even more essential to a legislative body, despite the fact that contempt powers are associated with government in the whole of the Western world only in common law countries. See Goldfarb, *The Contempt Power*, p. 2, Columbia University Press (1963).

Stark necessity is an impressive and often compelling thing, but unfortunately it has all too often been claimed loosely and without warrant in the law, as elsewhere, to justify that which in truth is unjustifiable. *United States v. Green*, 356 U. S. 165, 213, 78 S. Ct. 632, 2 L. Ed. 2d 672, 705 (1958).

Father Groppi was not engaged in any allegedly disruptive acts at the time the Resolution was passed. He had voluntarily left the Assembly Chambers two days earlier. He posed no immediate or future threat to the Assembly's functioning. See Wright, *Federal Practice and Procedure*, Rule 42, Section 707, pp. 164-168. Police, sheriffs, and National Guardsmen were all available and actively guarding the Capitol building subsequent to Father Groppi's departure from the Chambers. The Assembly by its Resolution, as shown above, intended only to punish a past act. *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802 (1934), stands for the proposition that once a contemptuous act occurs within the immediate view of a legislative body, jurisdiction attaches and the subsequent removal of the obstruction does not necessarily destroy that jurisdiction.

... Where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance. 294 U. S. 125, 148.

However, in *Jurney*, citing *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448, 61 L. Ed. 881 (1916), it was said that the character of the offense was the only jurisdictional test to be applied by a reviewing court while

... the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment. 294 U. S. 125, 149.

The Court in *Marshall* (supra) described the appropriate test and limits more fully.

... when an act is of such a character as to subject it to be dealt with as a contempt . . . , we are of the opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right, *in the use of legitimate and fair discretion*, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference. 243 U. S. 521, 545.

Marshall was a case involving a contempt proceeding wherein the defendant was to be tried by the Senate, that is, summary contempt was not even an issue. In the present case, the Wisconsin Assembly sought to punish Father Groppi on the basis of an *ex parte* summary proceeding. The Assembly's action cannot be termed "the use of legitimate and fair discretion" in the *Marshall* or *Jurney* sense even as to regular contempt proceedings, much less summary ones. As stated above, the contempt power is one subject easily to abuse and one to be limited to the least exercise possible to achieve the necessary ends. *Anderson v. Dunn*, (supra). A court, today, could not, two days after a contemptuous act, summarily sentence a defendant *ex parte*. *Johnson v. Mississippi*, — U. S. —, 92 S. Ct. —, 29 L. Ed. 2d 423 (1971). Therefore, the legitimate use of discretion dictates that the Assembly in seeking to punish Father Groppi should have

relied upon the traditional criminal procedures of our society. The dignity of the Assembly relied upon proven practices rather than reverting to Star Chamber practices in ordering punishment *ex parte*. As Mr. Justice Holmes said for himself and Mr. Justice Brandeis:

When there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with the other illegal acts. *Toledo Newspaper Co. v. United States*, (dissent), 247 U. S. 402, 425-426, 38 S. Ct. 560, 62 L. Ed. 1186, 1196 (1918).

Reason and fairness demand even in punishing contempt, procedural safeguards within which the needs for the effective administration of justice can be amply satisfied while at the same time the reach of so drastic a power is kept within limits that will minimize abuse. *Sacher v. United States*, (dissent), 343 U. S. 1, 24, 72 S. Ct. 451, 96 L. Ed. 717, 731-732 (1951).

There was no need for expediency in the instant case. There was no need to exercise any contempt power, much less summary powers *ex parte*. There was no reason to deny Father Groppi all the traditional procedural incidents of the criminal justice system of Wisconsin. See *Harris v. United States*, 382 U. S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965).

Respect and obedience in this country are not engendered and rightly not—by arbitrary and autocratic procedures. In the end such methods only yield real contempt for all the courts and law. *United States v. Green*, (dissent), 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672, 707 (1958).

III. NOTICE AND AN OPPORTUNITY TO BE HEARD ARE REQUIRED IN THE EXERCISE OF SUMMARY CONTEMPT POWER.

Except for *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888) and *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952), the many contempt cases, legislative and judicial, reported in our jurisprudence include none where the contemnor was given neither notice nor any opportunity to be heard prior to the finding of contempt and the pronouncement of sentence. In *Terry* however, the Court expressly withheld ruling on whether a Court could cite a person for contempt and order his imprisonment without any notice or hearing at a date subsequent to the alleged act of contempt. In *Sacher* the trial court made its finding of contempt and pronounced sentence without affording the contemnors any opportunity to be heard but did allow the contemnors the opportunity to be heard after sentence had been pronounced. Subsequent decisions upholding summary contempt convictions have stressed the fact that the trial court in each instance allowed the defendants to be heard prior to imposition of sentence. *Brown v. United States*, 359 U. S. 41, 79 S. Ct. 539, 3 L. Ed. 2d 609 (1959); *Levine v. United States*, 369 U. S. 610, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960).

In *Panico v. United States*, 375 U. S. 29, 84 S. Ct. 19, 11 L. Ed. 2d 1 (1963), this Court overturned a finding of contempt in a summary proceeding under Rule 42(a), Federal Rules of Criminal Procedure, holding that the record therein required a hearing to determine Panico's mental responsibility for his conduct. Similarly, in *Widger v. United States*, 244 F. 2d 103 (C. A. 5, 1957), the Fifth Circuit

Court of Appeals ruled the trial court there should have held a hearing on a contemnor's motion to vacate a judgment and sentence pursuant to the summary contempt provisions of Rule 42(a), Federal Rules of Criminal Procedure, when the motion to vacate challenged the factual basis for the contempt finding. The Court of Appeals emphasized the lack of notice of the contempt charge to the contemnor and his non-representation by counsel.

In a case involving summary contempt under Rule 42(a), Federal Rules of Criminal Procedure, Judge Friendly, dissenting in part, stated that "summary" means "only that certain usual procedural requirements may be dispensed with, not the basic rights can be sacrificed". *United States v. Galante*, 278 F. 2d 72, 78 (C. A. 2, 1962). The majority in *Galante*, while not approving the lack of an opportunity to respond, found no reversible error since there had been no request to be heard and no indication the trial court would have denied the contemnor a right to be heard. 278 F. 2d at p. 76. Judge Friendly's dissent in *Galante* has been commented upon favorably in 8 Moore's *Federal Practice-Cipes*, Criminal Rules, Section 42.04(2), p. 42-21, (Matthew Bender, 1970), and Wright, *Federal Practice and Procedure: Criminal*, Section 708, pp. 169-171, West Publishing Company, 1969). In addition, the right of allocution has long been recognized in cases of judicial summary contempt. *In re Maury*, 205 Fed. 626 (C. A. 9, 1913).

Our system of government is premised on the belief that the citizen must be protected against the exercise of absolute power by the Government. *United States v. U. S. District Court*, 9 Cr L. 2045 (C. A. 6, 1971). It is contrary to the American system to allow a person to be imprisoned without giving him an opportunity to respond to the charges against

him. *Hill v. United States*, 318 U. S. 424, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1968); *Green v. United States*, 365 U. S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1965); *In Re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1933); *Galpin v. Page*, 85 U. S. (18 Wall) 350, — S. Ct. —, 21 L. Ed. 959 (1874).

Before any governmental body may act to deprive a citizen of his liberty, he is entitled to a minimal opportunity to be heard. This principal has been stated in many areas involving the interrelationship between the Government and the citizen. *Goldberg v. Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (termination of welfare benefits); *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 1965 (1963) (disqualifying from unemployment compensation); *Slochower v. Board of Higher Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956) (discharge from public employment); *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (C. A. 5 1961) (suspension from public school); *Hahn v. Burke*, 430 F. 2d 100 (C. A. 7 1970) (probation revocation); *McCarley v. Sanders*, 309 F. Supp. 8 (M. D. Ala. 1970) (expulsion of a member from the legislature).

The procedures followed by the Wisconsin Assembly in citing Father Groppi for contempt and imposing sentence violated the ancient maxim that "no man shall be punished before he has had an opportunity of being heard", *The King v. Benn and Church*, 6 T. R. 198 (1795) (Lord Kenyon, Chief Judge). Without any prior notice to petitioner and without giving him or his counsel any opportunity to be present or to be heard the Assembly cited him for contempt, found him

guilty of an offense which had allegedly been committed two days earlier and sentenced him to imprisonment. Prior to the passage of the contempt resolution by the Wisconsin Assembly the Wisconsin Attorney General had obtained a temporary injunction from the Circuit Court for Dane County, Wisconsin, enjoining Father Groppi from any further disruptions of the Wisconsin Assembly. On October 17, 1969, the Circuit Court vacated the temporary injunction holding that the State had made no showing of any likelihood that the petitioner herein would commit any act to interfere with the processes of the Government of the State of Wisconsin. (App. pp. 61a-64a)

While it has long been held that legislative bodies have contempt powers, *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375, 79 L. Ed. 802 (1935), there is no other reported instance in which a legislative body exercised its contempt power without according the person charged the minimal requirements of due process, that is notice of the charge against him and an opportunity to answer the charge. In the exercise of its contempt power Congress has always met the minimal due process standards of notice and an opportunity to defend. Goldfarb, *The Contempt Power*, 163 (1963). Consistent with this tradition, the District Court herein envisioned a hearing before the Assembly in which the petitioner would have been required to show cause why he should not be punished for his conduct. 311 F. Supp. at 780. (App. p. 91a.) No protracted trial bringing the legislative process in Wisconsin to a halt was contemplated by the District Court or requested by petitioner herein.

In justification of its position that petitioner was not entitled to the minimal right to appear before the legis-

lative body in response to the charge, the Court of Appeals stated that petitioner's rights would be protected by the judicial review of the contempt resolution. 436 F. 2d at 331. (App. p. 86a.) In its opinion denying habeas corpus relief, the Wisconsin Supreme Court had indicated that such judicial review was available to the petitioner., *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N. W. 2d 192 (1969) (App. p. 109a).

Since earlier Wisconsin case law had indicated to petitioner that he was not entitled to any hearing on the merits of a contempt citation, *State ex rel. Reynolds v. County Court*, 11 Wis. 2d 560, 105 N. W. 2d 876 (1960), the petitioner moved the Wisconsin Supreme Court for a rehearing of its decision denying habeas corpus relief in order to clarify the right to judicial review. The petition for rehearing was denied by the Wisconsin Supreme Court without opinion. (App. p. 65a).

Assuming full judicial review of the factual basis of the legislative contempt resolution was available to petitioner, such post-conviction protection cannot be equated with the minimal protection that the petitioner requested prior to his imprisonment, especially where the State courts are denying petitioner bail pending such review. Mr. Justice Murphy so noted in his concurring opinion in *Estep v. United States*, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567 (1946):

There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation.

Similarly, Justice Frankfurter dissenting in *In Re Oliver* stated:

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair if in the Court in which the accused can contest for the first time the validity of the charge against him he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. 333 U. S. at p. 284-85.

IV. THE CONCLUSIONARY NATURE OF THE LEGISLATIVE CONTEMPT RESOLUTION MAKES IT CONSTITUTIONALLY DEFECTIVE.

Not only was petitioner denied notice of the charge against him and an opportunity to respond thereto, but the Assembly's contempt resolution merely cited a legal conclusion without any statement of the underlying facts supporting that conclusion. Such a statement of the underlying facts is constitutionally required in order to sustain a finding and sentence of summary contempt. *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888); *Cooke v. United States*, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1924).

This constitutional requirement has been codified in Rule 42(a) of the Federal Rules of Criminal Procedure and in cases decided thereunder. *Tauber v. Gordon*, 350 F. 2d 843 (C. A. 3 1965); *Widger v. United States*, 244 F. 2d 103 (C. A. 5 1957); *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 806 (C. A. 7 1961).

The failure to state the underlying facts supporting the contempt resolution compounds the difficulties already

cited herein for petitioner to obtain a meaningful judicial review of the contempt order, i.e. the question as to the availability of any judicial review and the lack of any transcript of the proceedings in the legislature. See *Great Lakes Screw Corp. v. N. L. R. B.*, 409 F. 2d 375 (C. A. 7, 1969).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the District Court for the entry of an order granting the Petition for Habeas Corpus and releasing petitioner from any further custody or restraint pursuant to the Resolution adopted by the Assembly of the State of Wisconsin on October 1, 1969.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-112

JAMES E. GROPP, *Petitioner,*

—v.—

JACK LESLIE, Sheriff of Dane County,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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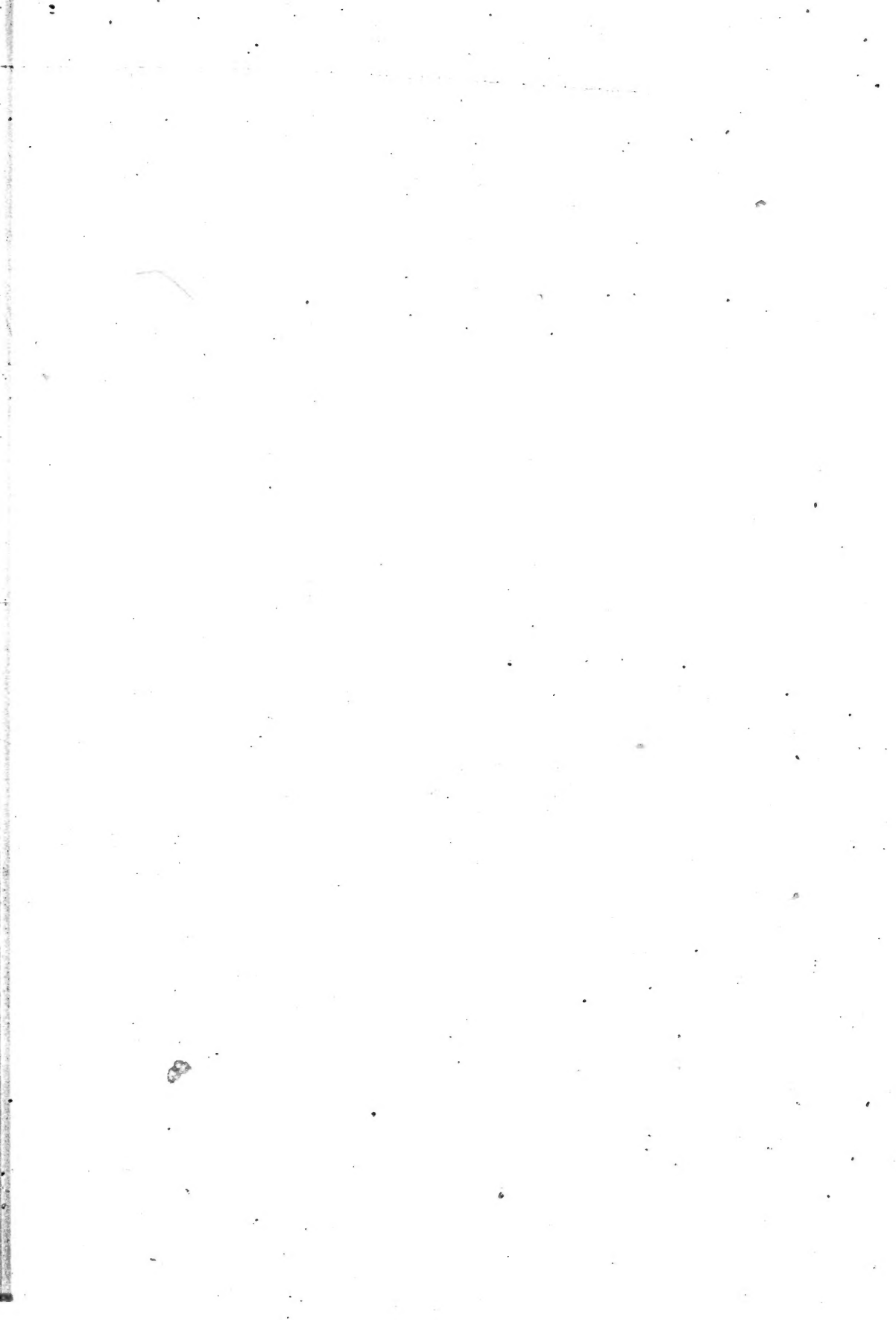
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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus*

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members dedicated exclusively to defense of those principles embodied in the Bill of Rights.

The ACLU has long been concerned with the delineation of the proper scope of legislative power with regard to the liberties of the individual. Accordingly we have participated in many of the cases before this Court where such

* Letters of consent to the filing of this brief from counsel for the petitioner and respondent have been filed with the Clerk of the Court.

issues of legislative authority have been considered. *E.g.*, *Bond v. Floyd*, 385 U.S. 116 (1966).

We believe that this case represents a particularly egregious example of legislative overreaching. If the conduct of the Wisconsin Assembly is sustained, a new era of legislative "privileges"—of the kind which were so abused in England—may be ushered in.

Statement of the Case

On October 1, 1969 the Wisconsin State Assembly passed a resolution citing the petitioner for "contempt of the Assembly" and causing his incarceration. The citation arose out of an incident two days earlier when the petitioner allegedly, in the language of the resolution, "led a gathering of people . . . which by its presence on the floor of the Assembly . . . prevented the Assembly from conducting public business and performing its constitutional duty." Based on this recitation, the resolution concluded that petitioner's actions constituted "disorderly conduct in the immediate view of the House and directly tending to interrupt its proceedings," made punishable under Wisconsin law by summary contempt.

Petitioner's efforts to secure release in the State courts were unavailing and he commenced the instant federal habeas corpus proceeding.

ARGUMENT

Introduction

The decision below upholds an unprecedented method of imposing a sentence of legislative contempt. Accordingly, the Court must consider the history of legislative contempt in order to assess the validity of the practice employed in this case.

Legislative contempt has its antecedents in Parliament's early struggles to establish parity with the Crown. But in the century preceding the American Revolution, the doctrine of Parliamentary privileges, enforced by the imposition of contempt sentences, was greatly abused primarily in order to inhibit criticism by the press. This history was well known to the Founding Fathers, and the majority of new States withheld such powers from their legislatures.

Since then, the power of the legislature to hold individuals in contempt has been greatly circumscribed. It is questionable whether a legislature by itself can ever incarcerate an individual for contempt. But even assuming it can, procedural fairness must be required as a guarantee against abusive practices. See *Watkins v. United States*, 354 U.S. 178 (1957). Especially where, as here, the events which gave rise to the citation have receded into the past, there is no reason for denying procedural due process to the alleged contemnor. See *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

1. The history of legislative contempt.

The history of legislative contempt in England and America is a stormy one that reflects the abuses which often accompany the exercise of the power. See *Watkins v. United States*, 354 U.S. 178, 187-192 (1957); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 700-714 (1926) (hereinafter, *Legislative Contempt*). While legislatures in this country have generally not acquired the same broad powers to punish for contempt as was exercised in the past by both Houses of the English Parliament, see *Kilbourn v. Thompson*, 103 U.S. 168, 183-189 (1881), it is widely recognized that the idea of legislative contempt comes to us from the pages of English history and that legislatures in this country that exercise the power to punish for contempt are following the example of the English Parliament. *Watkins v. United States*, *supra* at 188; Goldfarb, *The Contempt Power*, 1-3 (1963).

The power of Parliament to punish non-members for contempt can best be understood in the context of the struggle of the House of Commons and, to a lesser extent, of the House of Lords to gain recognition for their ancient privileges. The contempt power was the principal means to give effect to the privileges claimed; and both Houses chiefly used the contempt power to punish persons for breach of privilege. Potts, *Legislative Contempt*, *supra* at 692. Among the privileges claimed by Parliament on behalf of its members were the freedoms of speech and debate and the freedom from arrest or other molestation during or on the way to a session. In addition to enforcing privileges

applicable to individual members, each House also punished as a breach of privilege anything affecting the honor and dignity of the House. Wittke, *The History of English Parliamentary Privilege*, 49 (1921) (hereinafter, *Parliamentary Privilege*). Disobedience of the order of the House was also treated as a breach of privilege subject to punishment for contempt. Maitland, *Constitutional History of England*, 377-380 (1908).

Parliament's insistence, on the whole successful, that Tudor and Stuart monarchs recognize its privileges no doubt contributed significantly to the development of Parliamentary supremacy and representative government in England. Parliament could not govern the country unless its members could speak freely on matters of state. *Strode's case* in 1512 and *Elliot's case* in 1629 reveal that the purpose of the privilege of free speech and debate was to protect Parliament members from intimidation by the monarch and accountability before a possibly hostile judiciary. The privilege thus protected the independence of the legislature. *United States v. Johnson*, 383 U.S. 169, 179, 181-82 (1966). Likewise Parliament found it necessary to treat as a breach of privilege arrests and other molestations, from whatever sources they might come, that hindered members from being actually present in Parliament and from participating in the legislative function, Wittke, *Parliamentary Privilege*, *supra* at 15-16.

But another, darker side of Parliamentary privileges appeared in the seventeenth and eighteenth centuries once Parliament began to prevail in the struggle for supremacy. Abuses of the legislative power became commonplace. Both Houses

“made such addition to their privileges, and invented so many new ones, that the subject was often the victim of a Parliamentary Tyranny which deprived him of even his ordinary common law remedies and guarantees. During the reign of George I and George II, many cases that were nothing more than trespasses upon a member’s estate, and in no way affect his person, were declared breaches of privilege, and were punished by a Parliament house as such. . . . By considering such offenses as breaches of privilege, they were *ipso facto* removed to a new court and a new jurisdiction for trial—to a court and jurisdiction where many of the ordinary safeguards of the subject’s liberty did not apply.” Wittke, *Parliamentary Privilege*, *supra*, at 17.

The House of Commons punished as contempt everything from cutting down trees on a member’s estate to the obstruction of a street leading to Parliament. *Id.* at 38, 45.

Even more dangerous to the liberty of the subject was the expansive interpretation given by Parliament to its power to punish breaches of privilege affecting the honor and dignity of Parliament. During the religious and political upheavals of the seventeenth century critical commentary of all kinds was treated as contempt of Parliament. See *Watkins v. United States*, *supra* at 189. Perhaps the most outrageous case arose from the private conversation of one Floyd, a Catholic, in which he expressed pleasure

“over the misfortune of the King’s Protestant son-in-law and his wife. Floyd was not a member of Parliament. None of the persons concerned was in any way

connected with the House of Commons. Nevertheless, that body imposed an humiliating and cruel sentence upon Floyd for contempt. The House of Lords intervened, rebuking the Commons for their extension of the privilege. The Commons acceded and transferred the record of the case to the Lords, who imposed substantially the same penalty." *Id.* at 189-190 (footnotes omitted).

Throughout the eighteenth century still further abuses of the legislative contempt power continued. The Whig oligarchy that came into power after the Glorious Revolution were masters of the art of inventing fictitious claims of privilege. Wittke, *Parliamentary Privilege*, *supra* at 15.

Parliament's exercise of the contempt power was particularly instrumental in stifling public discussion and preventing the development of a free press:

Both Houses of Parliament claimed the authority to summon, interrogate, and punish individuals who were charged with the dissemination of writings, which by various devices of logic were considered to be breaches of the privilege of Parliament. The exercise of such powers was not, as we have seen, uncommon in the seventeenth century and was carried on throughout most of the eighteenth century by both Houses. The restrictions by Parliament extended to almost as wide a range of published materials as was covered by seditious libel and were, it would appear, more expeditiously enforced than the common-law rules. Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control* 368 (1965 edition) (footnotes omitted) (hereinafter, *Freedom of the Press*).

At least four categories of writings were considered by Parliament to be breaches of privilege and therefore punishable by the respective Houses: (1) publications that libelled an individual member; (2) publications that affected the dignity of a House or of Parliament in general; (3) reflections on the government including aspersions on the King and his ministers; and (4) certain types of obscenity and blasphemy. In addition, Parliament kept its deliberations secret by punishing as contempt the publication of any report of its debates. Siebert, *Freedom of the Press*, *supra* at 369. Professor Siebert offers the following description of Parliament's efforts to enforce its own variety of the law of seditious libel:

By far the largest number of prosecutions by the House of Commons for published criticisms of the government were directed against nonmembers, principally newspaper publishers. Early in the century the House adopted the time-honored as well as time-consuming procedure of appointing a committee to investigate libels on the government. The publishers of the *Evening Post* (E. Barrington) and of the *Weekly Journal* (Mist) were turned up by one of these committees and after several delays were imprisoned and finally discharged after paying fees. In 1740 the publisher of the *Daily Post*, John Meres (Meere), suffered the same penalty. Where neither the author nor the publisher of a libelous pamphlet could be ferreted out, the paper was burned by the common hangman in public display, a practice inherited from the previous century and continued until the time of the American Revolution. Punishment by the Commons was limited to imprisonment during the session of Parliament and

payment of customary fees, whereas the Lords could theoretically imprison an offender indefinitely as well as fine him a substantial sum. By 1770 either because of the limitations on the punishment or because of a growing deference to the jurisdiction of the criminal courts, the House of Commons adopted the practice of petitioning the king to order a prosecution of the offending publishers before the common law courts. Among the last of such libels considered by the Commons during this period were the pamphlets, *The Present Crisis with Respect to America* and *Crisis No. 3*, which were voted as scandalous libels on the king and which, with the concurrence of the House of Lords, were publicly burned on 7 March 1775. Toward the end of the century Parliament became engrossed in its legislative functions and, without resistance or publicity, quietly abdicated its functions as a prosecutor and judge of seditious libels in favor of the attorney general and common-law courts. So quietly was the transition made that little notice has been given to the active control which Parliament exercised over the press through its authority to punish for breach of privilege. Siebert, *Freedom of the Press*, *supra* at 373-374 (footnotes omitted).

Before finally relinquishing its power to banish libels on government, the House of Commons in 1769 expelled one of its own members, John Wilkes, for his political writings. The Wilkes episode, which attained great notoriety on both sides of the Atlantic, demonstrated "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." Wittke, *Par-*

liamentary Privilege, supra at 122 (quoted in *Watkins v. United States, supra* at 191).

Like their English counterparts, Colonial legislatures in this country also used the contempt power to punish libels on individual members and affronts to the honor and dignity of the legislature. Potts, *Legislative Contempt, supra* at 701-706. Perhaps the most famous incident occurred in New York where on the eve of the American Revolution the General Assembly imprisoned Alexander McDougal for 81 days for publishing a scandalous reflection on the dignity of the Assembly. McDougal was a prominent member of the Sons of Liberty who rose to the rank of major general during the Revolutionary War and later became a distinguished member of the State Senate of New York. O'Callaghan, *III Documentary History of New York*, 534-537; Potts, *Legislative Contempt, supra* at 705 n. 41.

The abuses of legislative power in the Wilkes and McDougal cases were well known to the founders of the federal and state governments in the United States. The federal Constitution, as well as the constitutions of nine of the original thirteen states, made no mention of the contempt power of the legislature. Potts, *Legislative Contempt, supra* at 712-718.

On the whole, and for understandable reasons, the legislature's power to punish for contempt has been received rather cautiously in this country, and legislatures used the power far more sparingly than did the House of Commons and the House of Lords. Here there has always been a separation of powers among executive, legislative and judicial branches of government, while the power of the English Parliament developed in a framework where the legis-

lature was not only supreme, but exercised judicial as well as legislative powers. See *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

2. Judicial proceedings are constitutionally preferred.

Based on this history of the abuses perpetrated by English legislatures, this Court has been extremely skeptical of the claimed power of legislatures to punish for contempt. Thus, in *Kilbourn v. Thompson*, *supra*, the Court held that the House of Representatives could not derive any authority to punish a citizen for contempt or breach of privilege from the precedents and practices of the two Houses of the English Parliament or from the adjudged cases in which the English courts had upheld those practices:

An Act of Congress which proposed to judge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution. 26 L. Ed. at 384.

The Court concluded that the House had exceeded its express constitutional authority by attempting to exercise the judicial power of adjudication of guilt and punishment. Having decided in *Kilbourn* that Congress had no express power to punish for contempt, this Court in *Marshall v. Gordon*, 243 U.S. 521, 542 (1917), held that although Congress enjoyed the implied authority "to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order

that legislative functions may be performed," such implied power did not embrace the power to punish for contempt.¹

This distinction between the two kinds of interference with legislative authority, and the consequent difference in whether or not a legislative contempt power will be implied, underlies subsequent decisions of this Court. Accordingly, where the contemptuous conduct consists of a refusal to supply information, thus frustrating congressional investigations, the power to punish for contempt was implied as necessary to the legislative function. See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Jurney v. McCracken*, 294 U.S. 125 (1935). And even as to this latter form of contempt, *Jurney* seems to be the last reported instance where the Congress attempted to impose punishment without resort to the courts. Instead, the Congress has relied on criminal prosecution, with all of the attendant due process guarantees. See *Watkins v. United States*, *supra*.

¹ The Court quoted with approval from the decision in *Kielley v. Carson*, 4 Moore P.C.C. 63, 13 Eng. Reprint, 225:

"In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions." 243 U.S. at 540.

Thus, we submit, the existence of legislative power to impose punishment for the kind of conduct alleged here is extremely doubtful. This is particularly so in light of this Court's recent decisions in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and *Johnson v. Mississippi*, 403 U.S. 212 (1971). Those cases indicate that a defendant in a judicial criminal contempt proceeding should receive a trial before a different judge. In *Mayberry*, Chief Justice Burger, in concurring, noted:

There are other means to cope with grave misconduct in the courtroom, whether that of the accused, his counsel, spectators or others. Statutes defining obstruction of justice have long been in force in many States, with penalties measured in years of confinement. Such statutes, where available, are an obvious response to those who seek to frustrate a particular trial or undermine the processes of justice generally. 27 L. Ed. 2d at 542.

Similarly, here, once the alleged contempt had been concluded, the constitutionally preferable response would have been criminal prosecution under state law.

3. The importance of procedure in cases of legislative contempt.

Because of the great potential for abuse of the legislative contempt power, procedural regularity and fairness was of vital importance in cases of legislative contempt. Both English and American history show that questions of legislative contempt were frequently treated as political questions decided along party lines. This danger was most apparent in the eighteenth century when both Parliament and Congress directly adjudicated cases of legislative

contempt and imposed punishment on the guilty individuals. Today the danger has been considerably alleviated because both Parliament and Congress refer cases of legislative contempt to the courts for prosecution and punishment. This reliance on judicial enforcement insures that fair procedures will be observed and due process of law will be afforded in adjudicating cases of legislative contempt. But even assuming that legislatures themselves have the power to impose punishment for the kind of conduct alleged here, but see point 2, *supra*, at the very least the legislature must grant a fair hearing.

Until the end of the eighteenth century each House of Parliament proceeded directly in cases of contempt by summoning the contemnor before the bar of the House and determining his guilt or innocence. All of the reported cases indicate that the alleged contemnor was given notice of the charges and at least some opportunity to be heard. Parliament did not try individuals *in absentia* but always insisted that the contemnor be personally present at the bar. To a certain extent each House in such proceedings acted according to rules of procedure; precedents were collected and often respected. But far too often questions of breach of privilege were treated along party lines. Maitland, *Constitutional History of England* 379 (1908). Such treatment lead to many excesses, and the more recent practice of the House of Commons has been to avoid such excesses of jurisdiction by directing a prosecution by the Attorney General for contempts that have been brought to its attention. Taswell-Langmead, *English Constitutional History* 587 (11th ed. 1960). The House of Commons first adopted the practice around 1770 in libel cases because the repressive use of the contempt power had aroused con-

siderable opposition. Siebert, *Freedom of the Press*, *supra* at 373.

Congress likewise rarely exercises its power to punish directly for contempt. Instead it certifies the facts constituting the contempt to the United States Attorney for the district in which the contempt occurred for prosecution and punishment in the federal courts under 2 U.S.C. Sections 192-194. Goldfarb, *The Contempt Power* 43. In former times Congress followed the old English practices of summoning the contemnor before the bar of the House and then trying and punishing him for contempt. *Journey v. McCracken*, *supra*, appears to be the last recorded instance of this practice. The dangers inherent in such a practice are apparent from the well known proceedings brought by the Senate in 1800 against William Duane. Duane, the editor of the leading Jeffersonian paper, *Aurora*, was ordered to appear before the Federalist-dominated Senate to answer the charge of publishing a libel on the Senate and one of its committees. Duane never appeared because of restrictions placed on the role of his counsel. The Senate, on a party line vote, treated his non-appearance as contempt and ordered his imprisonment. Smith, *Freedom's Fetters*, 277-306 (1956); Potts, *Legislative Contempt*, *supra* at 720-21. Thus, even with a summary hearing, abuses were perpetrated; with no procedures at all, as here, the possibilities for bad faith punishment are enormous.

The present practice of referring cases of legislative contempt for prosecution in the federal courts assures that procedural safeguards will be observed and that a partisan spirit will not determine the outcome. "By thus making the federal judiciary the affirmative agency for enforcing the

authority that underlies the Congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." *Watkins v. United States, supra* at 217 (Frankfurter, J., concurring). Even if the Court does not hold such a practice to be constitutionally mandated, it should at least require the legislature to afford minimum due process safeguards.

4. The legislative resolution committing the petitioner for contempt deprived him of due process of law.

In a variety of respects the action of the Wisconsin Assembly denied the petitioner due process of law. The Assembly found the petitioner guilty of contempt and sentenced him to six months in prison without providing any opportunity to be heard before the Assembly or one of its committees—let alone a court of law—on either the issue of guilt or the question of punishment. Moreover, the Assembly acted in an *ex parte*, summary manner even though two full days had transpired since the events in question. At that point, the need for summary punishment had vanished and the imposition of such punishment offends due process. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Finally, the contempt resolution was so vague as to render any meaningful judicial review all but impossible. Cf., *In Re Gault*, 387 U.S. 1 (1967).

The Wisconsin legislature made no attempt to afford Groppi any notice of the charges against him or any opportunity to be heard on his own behalf. It would be anomalous to recognize the procedural rights of the targets of legisla-

tive and administrative investigations, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Jenkins v. McKeithen*, 395 U.S. 411 (1969), but to deny altogether the rights of the criminal defendant before the legislative body. At the very least this Court should require that the legislature follow the time-honored practice of summoning the offender before the Bar and affording him an opportunity to be heard. If the legislature finds it too cumbersome to afford a contemnor this type of hearing, it can always refer the matter to the executive for prosecution in the ordinary courts of justice. In most instances this would appear to be the better course. The public, as well as the defendant himself, will have more respect for the impartial judgment of a court than for the legislature's vote on a contempt resolution. The legislature is necessarily a political body; legislators are responsible to their constituents and are not expected to exclude political considerations from their mind. If the legislature fears that the executive may decline to prosecute contempt cases, it can enact legislation patterned on 2 U.S.C. Section 194 imposing a duty on the executive to prosecute.

In addition to the lack of procedures, the vagueness and uninformative nature of the contempt resolution passed by the Wisconsin Assembly also denied Groppi of his right to due process of law. It is a fundamental rule that a summary contempt order in judicial proceedings must carry in itself a statement of the acts or words constituting the contempt. See *Ex parte Terry*, 128 U.S. 289, 305 (1888). The Seventh Circuit has applied this requirement to the quasi-judicial proceedings of administrative agencies, *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375 (1969). The California Supreme Court has also required that in cases of summary contempt the legislature must

recite in the contempt order the facts of what occurred in the immediate view and presence of the legislature. *Ex parte Battelle*, 207 Cal. 227, 277 Pac. 725, 736 (1929).*

The contempt resolution here is similarly defective because it does not recite the facts of how the gathering which the petitioner allegedly held on the Assembly floor prevented the Assembly from conducting public business and performing its constitutional duty. The resolution is conclusionary and does not inform either the petitioner or a reviewing court of the facts that constituted the alleged contempt. A person cannot defend himself against such a vague charge, nor can a reviewing court determine the validity of the commitment. See *In Re Gault*, *supra*.

In England the courts have refused to inquire into the merits when Parliament has committed an individual for contempt, thus allowing Parliament to commit for contempt without giving any reason or stating any facts. *Case of the Sheriff of Middlesex*, 11 Adolp and Ellis 273 (Q.B. 1840). In this country the practice has been different, and this Court has traditionally reviewed the merits of a conviction for legislative contempt. *Kilbourn v. Thompson*, *supra*; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). Indeed, even the Wisconsin Supreme Court has adopted this same practice, see *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 171 N.W. 2d 192 (1969). But such a review cannot pro-

* *Battelle* was a case of summary contempt because the alleged contemnor (Battelle) had been brought before the bar of the California Senate and had there refused to answer various questions. The contempt order was held invalid by the court because it did not state the precise questions which the witness refused to answer and their pertinency to the investigation. The omissions made it impossible for the court to judge the correctness of the legislature's committal of Battelle for contempt.

ceed fairly unless the legislature states the facts that constitute the contempt. In the absence of such a statement, the reviewing court was left with the improper alternative of taking Judicial Notice of what transpired on the Assembly floor on September 29, 1970. Davis, *Administrative Law Treatise*, Paragraph 15.03 (1958).

It is well settled that this Court has jurisdiction to determine whether the action of a state legislative body deprives a person of a federal constitutional right. *Bond v. Floyd*, 385 U.S. 116 (1966). This Court should hold that the Wisconsin Assembly violated petitioner's right to due process of law under the Fourteenth Amendment. The abuses which have accompanied past exercises of the legislative power to punish for contempt should lead the Court to insist that the legislature at the very least afford the procedural safeguards of notice and hearing before it punishes a person for contempt. While the legislature need not afford notice and hearing before it clears the floor of disrupters by ordering their arrest, whether by local law enforcement officials or by its own sergeant-at-arms, but it must observe those safeguards before it punishes an alleged disrupter by sentencing him to jail for six months.

CONCLUSION

For the reasons set forth herein, the decision below should be reversed.

Respectfully submitted,

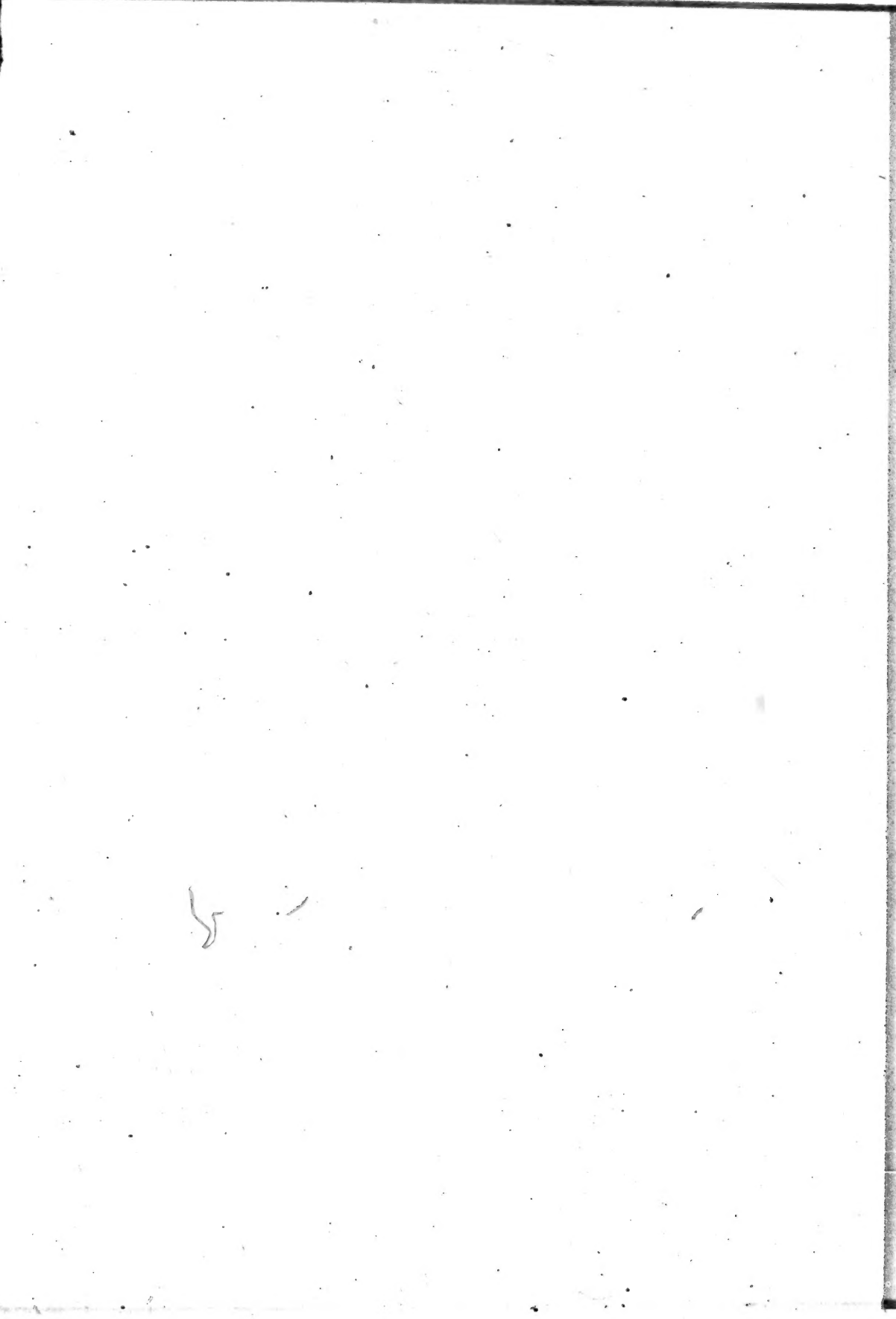
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-112

JAMES E. GROPP, *Petitioner,*

v.

JACK LESLIE, SHERIFF OF DANE COUNTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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No. 70-112

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-112

JAMES E. GROPP, *Petitioner,*

v.

JACK LESLIE, SHERIFF OF DANE COUNTY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Where a person engages in disorderly conduct in the immediate view of a house of a state legislature, tending to interrupt its proceedings, does the passage of a resolution of contempt, and commitment thereunder for a maximum of six months, without further formal charges, notice or hearing, deny the contemnor due process of law?

2. Does due process require that a legislative resolution of contempt set forth more "underlying facts and circumstances" than were included in the Wisconsin Assembly's resolution?

STATEMENT OF THE CASE

On October 1, 1969, the State Assembly of Wisconsin passed a resolution reciting that petitioner Groppi had led a gathering of people onto the floor of the Assembly two days earlier (September 29, 1969) and that petitioner's conduct in so doing violated an Assembly rule and prevented the Assembly from conducting its business. The resolution found that petitioner's conduct constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and further found the petitioner to be in contempt of the Assembly, said contempt being punishable by the Assembly under Article IV, Section 8 of the Wisconsin Constitution and sec. 13.26 (1) (b) of the Wisconsin Statutes. (See addendum to this brief for complete text of the Assembly resolution, constitutional and statutory provisions.) Petitioner Groppi was arrested on the same day the resolution was passed and imprisoned in the Dane County, Wisconsin, jail pursuant to the direction of the resolution that he be imprisoned for a period of six months or for the duration of the then current session of the legislature, "whichever is briefer."

The petition for a writ of habeas corpus alleged, and the respondent admitted, that the contempt resolution was passed and carried into execution without formal notice served on the petitioner and without his presence at or participation in any of the proceedings of the Assembly leading thereto.

Within forty-eight hours after his arrest and confinement, petitioner commenced a civil action in the United States District Court for the Western District of Wisconsin for a declaratory judgment of the constitutionality of Wisconsin Statutes, secs. 13.26 and 13.27, pursuant to which the Assembly had acted in imprisoning him for contempt. He sought a temporary restraining order in connection therewith,

the effect of which would be to release him from confinement pending determination of the merits of the declaratory judgments action.

On Monday, October 6, 1969, the District Court denied the motion for a temporary restraining order on the ground that it would be the equivalent of a writ of habeas corpus which the District Court had no power to issue before petitioner's state remedies had been exhausted. That court issued a *caveat* that it would consider state corrective process ineffective if it did not afford a determination of petitioner's claims "with extraordinary promptness." (A. 37a)

On the same day, a petition for a writ of habeas corpus in petitioner's behalf was filed in Dane County Circuit Court, which ordered the filing of a response and a hearing on the issues the following morning, Tuesday, October 7. Following the hearing in Circuit Court, the matter was taken under advisement; petitioner's attorneys filed a petition for bail and for leave to commence an original action for a writ of habeas corpus in the Wisconsin Supreme Court without waiting for the determination of the Circuit Court.

On Wednesday, October 8, 1969, the Dane County Circuit Court entered an opinion and order denying the petition therein for a writ of habeas corpus and petitioner's attorneys on the same day filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The District Court immediately issued an order requiring a response to the petition to be filed within three days.

On Friday, October 10, 1969, the Wisconsin Supreme Court, having earlier granted petitioner leave to amend his petition for a writ of habeas corpus in that court, heard oral arguments on the petition and took the case under

advisement. Later in the same day, the Wisconsin Supreme Court issued an order denying the petition. The response to Father Groppi's federal petition was filed on the following day, Saturday, October 11, 1969, and petitioner was admitted to bail by the District Court within hours thereafter. Petitioner remained free on bail until April 8, 1970, when he was discharged from custody on the order of the District Court.

Respondent appealed, and on October 28, 1970, the Court of Appeals for the Seventh Circuit reversed. Following rehearing *en banc*, that court affirmed the earlier decision, three judges dissenting. This judgment of the Court of Appeals *en banc* was handed down on January 6, 1971, one day before the *sine die* adjournment of the 1969 session of the Wisconsin legislature. The session having ended, petitioner could no longer be imprisoned under the contempt resolution. (Sec. 13.26 (2), Wis. Stats.)

SUMMARY OF ARGUMENT

I

American legislatures, national and state, have possessed and exercised the power to punish for contempt since colonial times.

Due process of law does not require that this power be exercised in conformity with any rigid procedural formulation; due process is accorded if the legislative body employs procedures available to and traditionally employed in courts, since, in contempt matters, both courts and legislatures are needful of similar protection and possess equally the means to protect themselves from forcible interference with their functions. There are no differences between courts and legislatures which require, in cases of *direct* contempt, that the contemnor be accorded greater procedural protection in a legislative chamber than he would be constitutionally entitled to receive in a courtroom setting.

The forcible disruption or "take-over" of a legislative chamber poses a greater threat to representative government than the forcible disruption of a single courtroom; certainly the need for a speedy and effective contempt procedure is no less in a legislative setting than in the courtroom.

II

Petitioner's challenge to the sufficiency of the resolution is new; it was not made previously in any state or federal court.

The incorporation into a contempt resolution of "underlying facts and circumstances" is not required by the Constitution. Rule 42 (a) of the Federal Rules of Criminal Procedure is not a codification of any constitutional principle.

In any event, the Wisconsin Assembly's resolution contains a recitation of evidentiary facts which leaves no doubt of the time, place and nature of the offense. It is in no sense "purely conclusionary."

ARGUMENT

I. Like Courts, Legislative Bodies Possess Power To Punish Summarily For Contempts Committed In Their Presence; Exercise Of That Power Does Not Deny Due Process.

A. National and state legislatures have always had contempt powers

Until this Court decided *Jurney v. MacCracken*, (1935) 294 U.S. 125, 79 L. ed. 802, 55 S. Ct. 375, the power of Congress to impose punishment for a contempt of one of its houses was in considerable doubt. The early case of *Anderson v. Dunn*, (1821) 6 Wheaton 204, 5 L. ed. 242, declared in strong terms that the power to punish for contempt was inherent in the nature of the legislative

body, and that to deny the power "leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption as rudeness, caprice, or even conspiracy, may meditate against it."

The Circuit Court for the District of Columbia, in *Ex Parte Nugent*, (1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10,375, held:

"The jurisdiction of the senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit, the necessity of such a jurisdiction to enable the senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction: but whether admitted or not, such is the law as laid down by the supreme court of the United States in *Anderson v. Dunn*, 6 Wheat. [19 U.S.] 224; and in *Kearney's Case*, 7 Wheat. [20 U.S.] 41."

(It is worthy of note that the court in *Nugent* gave its express approval to *secret* contempt proceedings.)

Kilbourn v. Thompson, (1881) 103 U. S. 168, 26 L. ed. 377, questioned some of the positive language in *Anderson v. Dunn*, *supra*, but expressly declined to pass upon the existence or non-existence of congressional power to punish

contempts in aid of the legislative function. (The reasoning found in *Kilbourn* has, in turn, been sharply questioned; see Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 692-699, 791-792.)

Marshall v. Gordon, (1917) 243 U.S. 521, 61 L. ed. 881, 37 S. Ct. 448, held void a commitment for indirect contempt of Congress where the allegedly contumacious act was deemed not to be of a character to obstruct the legislative process. By dictum, however, the court conceded the inherent right of Congress to punish "physical obstruction of the legislative body in the discharge of its duties."

Then Justice Brandeis, writing for a unanimous Court in *Jurney v. MacCracken*, supra, collected all of the pertinent authorities on the point to that time and resolved the doubts that had previously existed respecting the power of Congress to punish for contempt in aid of a legislative function. Mr. Justice Brandeis wrote:

"The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, Rev. Stat. § 102, U.S.C. title 2, § 192, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair v. United States*, 279 U.S. 263, 73 L. ed. 692, 49 S. Ct. 268. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *Re Chapman*, 166 U.S. 661, 671, 672, 41 L. ed. 1154, 1159, 1160, 17 S. Ct. 677: 'We grant that Congress could not divest itself or either of its

Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.' Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. * * *

"The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn v. Thompson*, 103 U.S. 168, 26 L. ed. 377, there was no legislative duty to be performed; or because, as in *Marshall v. Gordon*, 243 U.S. 521, 61 L. ed. 881, 37 S. Ct. 448, L.R.A. 1917F, 279, Ann. Cas. 1918B, 371, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

"The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies. * * *

The power of Congress to punish contempt in a proper case has never since been denied by this Court although, as noted in *Watkins v. United States*, (1957) 354 U.S. 178, 1 L. ed. 2d 1273, 77 S. Ct. 1173, "since World War II, the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House. * * * The Congress has instead invoked the aid of the federal judicial system in protecting itself against contumacious conduct." (In *Watkins*, the Court reversed a conviction for statutory contempt on the grounds that the pertinency of the questions which the defendant had refused to answer had not been made clear to the defendant. At the beginning of the opinion of the Court, written by Mr. Chief Justice Warren, a careful distinction is made between the contempt under consideration and "the case of a truculent or contumacious witness who refuses to answer all questions or who, by boisterous or discourteous conduct, disturbs the decorum of the committee room.")

As to the power of state legislative bodies to commit for contempts before them, there has been a singular unanimity of opinion in the courts that such power exists, either inherently, from the nature of the body and the necessity which gives rise to the exercise of that power, or by constitutional grant of the power, as in Article IV, Section 8, Wisconsin Constitution. We are unable to find a single report denying the existence of the power of a state legislative body to commit a person for contemptuous acts

committed in the view of that body and which tend to interrupt or obstruct its proceedings. A partial listing of the opinions recognizing the contempt powers of state legislative bodies follows:

Lowe v. Summers, (1897) 69 Mo. App. 637: the court held that the legislature's power to punish for contempt was inherent in the legislature in the exercise of its constitutional duties; that the Constitution, in separating legislative and judicial functions, did not take such power away from the legislature.

People ex rel. McDonald v. Keeler, (1885) 99 N.Y. 463, 2 N.E. 615: the power to commit or punish for contempt which had been exercised by Parliament in England was vested in the senate and assembly of New York, either by virtue of the adoption of the common law, or by reason of such power being inherent in legislative bodies.

In Re Gunn, (1893) 50 Kan. 155, 32 P. 470: "it [the house] has full power to punish for contempt any witness who refuses to appear when personally subpoenaed in an election contest, or other proper proceedings pending. It has also the power to protect itself from disorder, disturbance, or violence. * * * It is a body or house 'having authority to commit.' "

Burnham v. Morrissey, (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 767: power of the Massachusetts legislative assembly to commit for contempt a person refusing to produce his books before a legislative investigating committee upheld.

Ex Parte McCarthy, (1866) 29 Cal. 395: the state senate had inherent contempt powers under parliamentary law, affirmed by statute.

Ex Parte Dalton, (1886) 44 Ohio St. 142, 5 N. E. 136: the Ohio general assembly possessed inherent power, aided by statute, to commit for contempt a clerk of court who refused to produce records before an investigating committee.

Ex Parte Parker, (1906) 74 S.C. 466, 55 S.E. 122: upholding imprisonment of a witness for contempt of a joint committee of the state legislature, the witness having refused to testify. "* * * It is to be observed the Congress possesses no powers of legislation except those conferred by the Constitution of the United States, while the general assembly is invested with all the legislative power of the state except that denied by the Constitution."

Canfield v. Gresham, (1891) 82 Tex. 10, 17 S.W. 390: upholding the imprisonment of a reporter who attempted to enter the House against its order, for obstructing the proceedings of the legislature, and his arrest and commitment by the sergeant-at-arms, saying: "The House had unquestionably the right to determine whether or not the acts of plaintiff were an obstruction to its proceedings within the meaning of the Constitution, and, having so determined, to cause him to be imprisoned as he was."

In Re Falvey, (1858) 7 Wis. 630: upholding the power of the Wisconsin legislature to cite and imprison for contempt a witness who refused to appear before its joint committee.

C. S. Potts, reporting on his comprehensive study of legislative contempt powers in 1926, affirms that his survey of English and American colonial practice "shows clearly

that it was the generally accepted view that legislative bodies had the inherent right to protect their privileges, their dignity, and their honor by use of the power to punish for contempt." Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 712 (1926). Furthermore, that author says:

"* * * The precedents were plentiful and had continued down to the outbreak of the struggle for independence. The statesmen of the period were thoroughly familiar with these precedents and regarded the power to punish for contempt as an integral part, or auxiliary, of legislative power. As a necessary result, when they drafted their constitutions, state and national, and conferred the legislative power upon the bodies provided to receive it, they conferred the contempt power along with the rest. This doubtless explains the fact that most of the states, in drafting their new fundamental laws, made no mention whatever of the power to punish for contempt. * * *" Potts, *supra*, pp. 712-713.

Particularly instructive is the author's discussion of instances of the use of legislative contempt power as a "Protective or Defensive Function"; that function, he concludes, is not subject to challenge. Potts, *supra*, pp. 780-795.

B. Due process does not require a trial in cases of direct contempt

If due process of law requires—in the circumstances of this case—that petitioner be given formal notice of charges, time to prepare a defense, opportunity to confront and cross-examine the legislators who judged him and to present evidence in his own behalf before the Assembly, petitioner

did not receive due process. If, however, due process means that petitioner, having placed himself within the jurisdiction of a law-making representative body having contempt powers, was entitled to the formal judgment of that body in accordance with the historical and traditional usages of law, he received due process in full measure.

"The phrase 'due process of law,' " it has been said, "does not necessarily mean a judicial proceeding." *Palmer v. McMahon*, (1890) 133 U.S. 660, 668, 33 L. ed. 772, 10 S. Ct. 324. The Fifth Amendment is said to guarantee no particular form of procedure; it protects, rather, substantial rights: *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, (1938) 304 U.S. 333, 82 L. ed. 1381, 58 S. Ct. 904.

Twice in the last decade this Court has seen fit to reaffirm that "due process" is not defined by pushing buttons on a computer. In *Hannah v. Larche*, (1960) 363 U.S. 420, 4 L. ed. 2d 1307, 80 S. Ct. 1502, the Court cautioned that:

" '[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. * * * Whether the Constitution requires that a particular right obtain in specific proceedings depends upon a complexity of factors. The nature of the alleged right involved, *the nature of the proceeding, and the possible burden on that proceeding*, are all considerations which must be taken into account." (363 U. S. at 442, 4 L. ed. 2d at 1321) (Emphasis respondent's)

Again, in 1969, the Court in *Jenkins v. McKeithen*, (1969) 395 U.S. 411, 23 L. ed. 2d 404, 89 S. Ct. 1843, quoted the above language from the *Hannah* case, and expressly reaffirmed that decision.

This Court's refusal, in *Hannah and Jenkins*, to treat due process as a crystallized formulation of "do's" and "don'ts" applicable to all factual contexts is consistent with language found in the opinion of the Court in *Betts v. Brady*, (1942) 316 U.S. 455, 86 L. ed. 1595, 62 S. Ct. 1252:

"* * * That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed." (316 U.S. at 462, 86 L. ed. at 1602)

Petitioner's conduct, described in the resolution of contempt, constituted a *direct* contempt. Direct contempts necessitate and justify proceedings and judgments different from those which due process would require in cases of contempts committed *outside* the presence of the offended tribunal. As will be seen in the discussion which follows, both courts and legislative bodies possess the power to proceed summarily in cases of direct contempt—in full harmony with the Due Process Clause.

The authorities, in disclosing the source, nature and necessity of the contempt power, clearly demonstrate that, historically and traditionally, courts and legislatures derive their contempt powers from the same basic sources, and exercise them for the same reasons: preservation of their existence and authority. The parallel powers of courts and legislatures respecting contempts is cogently explained by Denman, C. J., in the case of *The Sheriff of Middlesex*, 11 Adol. and El. 273, 39 E.C.L. 170:

"Instances have been pointed out in which the crown has exerted its prerogative in a manner now considered illegal, and the courts have acquiesced; but the cases are not analogous. The crown has no rights which it can exercise otherwise than by process of law and through amenable officers; but representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the houses of parliament only, but as we observed in *Burdett v. Abbot*, 14 East. 138, to the courts of justice which, as well as the houses, must be liable to continual obstruction and insult if they were not intrusted with such powers. It is unnecessary to discuss the question whether each house of parliament be or be not a court; it is clear they cannot exercise their proper functions without the power of protecting themselves against interference. * * *

Once it is conceded, as it must be, that the Wisconsin Assembly is a "house having authority to commit," by what authority is it obliged to burden itself with lengthier or more complex procedures than those employed by courts in exercising identical powers? Courts do not, and are not required by the Constitution, to delay judgment or imposition of punishment in cases of direct contempts, but proceed summarily to impose punishment without notice of charges, opportunity to defend or offer explanations, confrontation or cross-examination of "accusers," or jury trials. Neither the Due Process Clause nor any other provision of the federal Constitution has ever been held to prohibit such summary disposition where, as in *Fr. Groppi's* case, the punishment imposed is no greater than that imposed for petty offenses. Such summary disposition, it has always been held, does not offend against the Due Process Clause.

This Court held, in *Ex Parte Terry*, (1888) 128 U.S. 289, 32 L. ed. 405, 9 S. Ct. 77, that a citizen could be imprisoned for contempt of court in his absence, without notice

of the intention of the court to act and without the citizen's being given an opportunity of being heard in defense, the Court saying:

" 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.' * * * It is utterly impossible * * * 'that the law of the land can be properly administered if those who are charged with administering it have not power to prevent instances of indecorum from occurring in their own presence.' "

In *Ex Parte Hudgings*, (1919) 249 U.S. 378, 63 L. ed. 656, 39 S.Ct. 337, the Court said:

"Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. * * * An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. * * * " (249 U.S. at 383)

In *Cooke v. United States*, (1925) 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390, the Court reversed and remanded a contempt citation but noted that:

"To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law, *and the punishment imposed is due process of law.*" (Emphasis respondent's)

In *In Re Oliver*, (1948) 333 U. S. 257, 92 L. ed. 682, 68 S.Ct. 499, the Court said:

"The narrow exception to * * * due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. * * *" (333 U.S. at 275)

And in *Fisher v. Pace*, (1949) 336 U.S. 155, 93 L. ed. 569, 69 S.Ct. 425, the Court held that:

"Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. * * * *Such summary conviction and punishment accords due process of law.*" (Emphasis respondent's)

The Wisconsin Supreme Court has, in its rulings, followed the reasoning of the above cases, holding that "summary punishment for civil contempt is permissible only if the conduct occurs in the presence of the court, and in the immediate view of the court. * * * If the conduct occurs before the court, there is no need for further fact-finding. From his own direct observations the court possesses the necessary information to proceed to judgment." *Upper Lakes Shipping v. Seafarers' International Union*, (1963) 22 Wis. 2d 7, 125 N.W. 2d 324; *In Re Adams Rib Inc.*, (1968) 39 Wis. 2d 741, 159 N.W. 2d 643. See also *Rubin v. State*, (1927) 192 Wis. 1, 211 N.W. 926 and *In Re Rosenberg*, (1895) 90 Wis. 581, 63 N.W. 1065.

It would be absurd and unreasonable to hold that petitioner was entitled to "more due process" because he committed acts before a house of the Wisconsin legislature than would

have been accorded him if he had carried out his disruptive and disorderly tactics in a court of law. The Court of Appeals correctly declined to so hold.

C. No relevant distinction exists between courts and legislative bodies regarding their power to punish summarily for contempt

The district court acknowledged that conduct of the type described in the contempt resolution would justify summary commitment—without notice or hearing—if it were observed by a judge in a courtroom. The district court found, however, that there were differences between a judge and a legislative body which made summary commitment by a lone judge constitutionally permissible, but a denial of due process if adjudged by a legislative body. The only differences noted by the district court were:

(1) "The physical contours of most legislative chambers, the comings and goings of the members, and the diffusion of attention of the members, among many factors, render it improbable that all of the members present would share a uniform perception and evaluation of an incident, upon the basis of which each member might then decide upon an appropriate response." (A. 10/a)

(2) "Unlike many courts of record, frequently if not typically no verbatim written record of legislative proceedings exists. If the availability of judicial review of the contempt citation is assumed, it would nevertheless be severely crippled by the absence of a definitive record of the incident." (A. 101 a-102a)

These conclusions of the district court were not supported by citations of legal authority or by references to scientific treatises. Their validity is open to serious doubt.

First, the district court in effect said that the perception of one witness to an event (or series of events) is more

reliable than the combined perception of many. The ramifications of such a proposition, if accepted, are far-reaching; a jury of one, for example, would be more reliable than a jury of twelve; a district judge could reliably perceive and evaluate contumacious conduct in open court, but the judges of an appellate court, sitting *en banc*, could not. Many other analogies could be cited, but the foregoing should suffice to demonstrate the fallacy of the district court's reasoning. If a choice must be made between the relative reliability of the perceptions of one witness and many witnesses, it would seem that the law should prefer the latter.

As to the second point made by the district court—i.e., the lack of a verbatim record of legislative proceedings—courts as well as legislatures must certainly be aware that contumacious conduct of the most vicious and disruptive sort will not necessarily appear in a transcript of proceedings. Without uttering a word for the written record, persons present in a courtroom or legislative chamber may totally paralyze the court or legislature by gestures, physical violence, facial expressions and countless other non-verbal means.

Similarly, familiar instances of contumacious conduct may occur in court proceedings which are often not recorded verbatim—for example, summations and arguments of legal issues. Certainly the threat of disorderly contempt does not disappear during the absence of a court reporter.

The district court's efforts to find constitutionally meaningful distinctions between legislatures and courts in cases of direct contempt were found not persuasive in the Court of Appeals. They do not merit the approbation of this Court.

D. The limited power of a legislative body to punish summarily for a direct disorderly contempt should not be taken away

It is not out of place to consider here the possible ramifications of the imposition of procedural strictures on legislative contempt powers. The nation has but one Congress; each state has but one legislature. The disorderly obstruction of the work of a single court within the nation or a state would rarely affect the welfare or diminish the power of the state or nation, since each is ordinarily served by many courts, whose time is often devoted largely to the resolution of private disputes. But legislative bodies are unique in their political environments; their work affects the public interest at all times, and affects the welfare of all the citizens of the state or nation directly. When a chair is thrown at a judge sitting in a divorce case, other judges and other courts are available to step in while the affected jurist mends — the business of government does not stop. When, in contrast, the work of the legislature is obstructed, no other personnel, no other governmental unit can assume its burden. Which, then, is the more serious threat to the government? Which threat more clearly calls for swift and certain vindication of authority?

A legislative body could, no doubt, postpone its work to try a citizen who has led a physical assault upon its chamber. In that case, the triers of fact would also be the witnesses for the prosecution (an inspiring spectacle) and the defendant would presumably be entitled, from the witness chair, to enlighten his captive audience with the ideas which originally prompted his assault upon it. Would due process require that the defendant be allowed to represent himself? — to interrupt the proceedings with taunts and invective? — to cross-examine for hours at a time? — to call a thousand witnesses?

We do not conjure an extreme case to make a point. Protracted and frequent legislative trials could easily and realistically become a favorite tool in the politics of confrontation and obstruction, to the detriment of representative government.

Even Goldfarb, who advocates drastic limitations of the contempt power, recognizes a clear need for a legislative weapon to deal with physical disorders:

"Physical disorders should be excluded, as a general rule, from the coverage of this misdemeanor statute. These offenses to governmental operations are better handled through a summary, plenary power, truly inherent in any legitimate working government body, of physical control and expulsion. The position that a government body should have some means of controlling noise, misbehavior and similar physical obstructions in its presence should require little argument and raise less dispute. Certainly a court or a congressional meeting should not be at the mercy of the obstreperous and uncouth. * * *"
Goldfarb, *The Contempt Power* (1963), 305-306.

II. The Legislative Contempt Resolution Was Constitutionally Adequate.

The second question presented is one which petitioner raises here for the first time. It is apparently prompted by Judge Kiley's dissent below.

Both petitioner and the American Civil Liberties Union claim that *Ex Parte Terry*, (1888) 128 U.S. 289, 32 L. ed. 405, 9 S. Ct. 77, holds it to be a requirement of the Constitution that a "statement of underlying facts" be incorporated into a resolution upon direct contempt. Petitioner makes the same claim for *Cooke v. United States*, (1925) 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390.

These cases do not so hold. Counsel for respondent has searched both reports for language supporting petitioner's claim, without success. Quite to the contrary, both opinions elaborate upon the distinction between procedures followed in cases of direct contempt and those required in contempts outside the presence of the committing tribunal; nothing is said of "underlying facts" in direct contempt cases.

Petitioner's claim that the requirements of Rule 42 (a), Federal Rules of Criminal Procedure, represent codification of a "constitutional requirement" finds no support whatever in the cases cited in support of that claim.

Rule 42 (a) embodies no principle of constitutional law binding upon a state legislature acting in response to a direct contempt. If it did, however, the resolution adopted by the Wisconsin Assembly on October 1, 1969, would not fail to meet its standard; the resolution amply recited the evidentiary facts upon which the judgment of contempt was based.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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ADDENDUM

The Contempt Resolution

1969 Spec. Sess. ASSEMBLY RESOLUTION 6

September 30, 1969 — Introduced by COMMITTEE ON RULES, by request of Assemblymen Sensenbrenner, Olson, Klicka, Nitschke, McDougal, Parkin, Schwefel, Lynn and Bock.

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

Constitutional and Statutory Provisions

Article IV, Section 8, of the Wisconsin Constitution:

"Rules; contempts; expulsion. SECTION 8. Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause."

Section 13.26 of the Wisconsin Statutes:

"13.26 Contempt. (1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

(a) Arresting a member or officer of the house, or procuring such member or officer to be arrested in violation of his privilege from arrest.

(b) Disorderly conduct in the immediate view of either house or of any committee thereof and directly tending to interrupt its proceedings.

(c) Refusing to attend or be examined as a witness, either before the house or a committee, or before any

person authorized to take testimony in legislative proceedings, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.

(d) Giving or offering a bribe to a member, or attempting by menace or other corrupt means or device to control or influence a member in giving his vote or to prevent his giving the same.

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27 (1), Wisconsin Statutes:

"13.27 Punishment for contempt. (1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law."

GROPPI v. LESLIE, SHERIFF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 70-112. Argued November 10, 1971—Decided January 13, 1972

Wisconsin legislative resolution citing petitioner for contempt for conduct on the floor of the State Assembly that occurred two days previous to the contempt resolution and sentencing him to confinement *held* violative of due process, since petitioner, who was readily available, was given no notice before the resolution was adopted or afforded any opportunity to respond by way of defense or extenuation. Pp. 499-507.

436 F. 2d 326 and 331, reversed.

BURGER, C. J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

William M. Coffey argued the cause for petitioner. With him on the brief were *Robert J. Lerner*, *John D. Murray*, and *Steven H. Steinglass*.

Sverre O. Tinglum, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Robert W. Warren*, Attorney General.

Melvin L. Wulf, *Sanford J. Rosen*, and *Robert H. Friebert* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ of certiorari to review the holding of the Court of Appeals for the Seventh Circuit, denying petitioner relief in habeas corpus proceedings after the District Court had granted relief.

On October 1, 1969, the Assembly of the Wisconsin Legislature passed a resolution citing petitioner for contempt and directing his confinement in the Dane County

jail for a period of six months or for the duration of the 1969 Regular Session of the legislature, whichever was shorter. The resolution recited that petitioner had, two days previously, led a gathering of people which, by its presence on the floor of the Assembly during a regular meeting in violation of an Assembly Rule, "prevented the Assembly from conducting public business and performing its constitutional duty." The resolution contained a finding that petitioner's actions constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" which the Assembly was authorized to punish under the State Constitution and statutes.¹

¹ The text of the October 1 resolution was as follows:

1969 Spec. Sess. ASSEMBLY RESOLUTION

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further

The record before us contains little to flesh out the recitations of the contempt resolution with the details of petitioner's conduct on the day of September 29, 1969. The Wisconsin Supreme Court, in its opinion denying petitioner's application for habeas corpus, took judicial notice that petitioner's conduct was designed to protest cuts in the state budget for certain welfare programs, and that the "occupation" of the Assembly chamber by petitioner and his supporters continued from midday to "well toward midnight" during all of which time the Assembly was prevented from conducting its lawful business.²

The contempt resolution was adopted without giving notice to petitioner or affording him an opportunity to present a defense or information in mitigation. A copy of the resolution was then served on petitioner who, at the time the resolution was passed, was already confined in the Dane County jail following his arrest on disorderly conduct charges arising out of the same incident as that

action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

Article IV, § 8, Wisconsin Constitution provides in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior"

Section 13.26, Wis. Stat. (1967), provides in part:

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . .

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

² On oral argument, counsel for petitioner conceded these facts. The paucity of the record may be attributed to the fact that the District Court acted on the pleadings without an evidentiary hearing.

underlying the resolution.³ Petitioner's confinement after he was served with the resolution was pursuant to its authority.

Petitioner then commenced actions in both state and federal courts contending that his confinement violated his constitutional rights, and seeking his release. Petitioner's applications for habeas corpus were denied by the Circuit Court for Dane County and the Wisconsin Supreme Court. However, after the state courts had acted, the United States District Court for the Western District of Wisconsin granted petitioner's federal habeas application. The District Court was of the view that petitioner had been denied due process of law guaranteed by the Fourteenth Amendment by the failure of the Assembly to accord him "some minimal opportunity to appear and to respond to a charge" prior to the imposition of punishment for contempt. On appeal, the Court of Appeals reversed the holding of the District Court; the holding of the panel was adopted by a narrowly divided court on rehearing *en banc*. We granted certiorari. For the reasons stated herein, we conclude that petitioner was denied due process of law by the procedures employed in punishing him for contempt, and we reverse the judgment of the Court of Appeals.

I

The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. *E. g.*, *Jurney v. MacCracken*, 294 U. S. 125 (1935); *Anderson v. Dunn*, 6 Wheat. 204 (1821). There is nothing in the Constitution

³ Tr. of Oral Arg. 4, 27. Petitioner was subsequently tried in County Court on the disorderly conduct charge. He was discharged by the court after the jury was unable to reach a verdict.

that would place greater restrictions on the States than on the Federal Government in this regard. See *Kilbourn v. Thompson*, 103 U. S. 168, 199 (1881). We are therefore concerned only with the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct committed in its presence.

This Court has often recognized that the requirements of due process cannot be ascertained through mechanical application of a formula. See, e. g., *Cafeteria Workers v. McElroy*, 367 U. S. 886, 894-895 (1961); *Hannah v. Larche*, 363 U. S. 420 (1960). Mr. Justice Frankfurter, in another context, aptly stated that due process "is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ." *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 162-163 (1951) (concurring opinion). Courts must be sensitive to the nature of a legislative contempt proceeding and the "possible burden on that proceeding" that a given procedure might entail. *Hannah v. Larche*, 363 U. S., at 442. Legislatures are not constituted to conduct full scale trials or quasi-judicial proceedings and we should not demand that they do so although they possess inherent power to protect their own processes and existence by way of contempt proceedings. For this reason, the Congress of the United States, for example, no longer undertakes to exercise its contempt powers in all cases but elects to delegate that function to federal courts. 52 Stat. 942, 2 U. S. C. §§ 192-194.

The potential for disrupting or immobilizing the vital legislative processes of State and Federal Governments that would flow from a rule requiring a full-blown legislative "trial" prior to the imposition of punishment for contempt of the legislature is a factor entitled to very great weight; this is particularly true where the con-

temptuous conduct, as here, is committed directly in the presence of the legislative body. The past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the house, or before a committee, and give answer to the misconduct charged against him. See *Jurney v. MacCracken*, 294 U. S., at 143-144; *Kilbourn v. Thompson*, 103 U. S., at 173, 174; *Anderson v. Dunn*, 6 Wheat., at 209-211; *Marshall v. Gordon*, 243 U. S. 521, 532 (1917).⁴ Such would appear to have been the general practice in colonial times, and in the early state legislatures.⁵ This practice more nearly resembles the traditional right of a criminal defendant to allocution prior to the imposition of sentence than it does a criminal prosecution. See *Green v. United States*, 365 U. S. 301 (1961).

⁴ See generally 2 A. Hinds, *Precedents of the House of Representatives*, cc. 51, 52; E. Eberling, *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt* (1928).

Hinds discusses an assault by one reporter on another on the floor of the House on June 11, 1836. The House did not proceed immediately to hold the party in contempt, but appointed a select committee to investigate the matter. The contemnor appeared before the committee and admitted his offense. Before it acted on the report of the committee by passing a contempt resolution, the House brought the contemnor before the Bar of the House. Hinds, *supra*, at § 1630. Hinds also discusses numerous instances of "direct" contempts committed by members of the House in which the contemnor was afforded an opportunity to speak in his behalf. See §§ 1642-1643, 1647, 1648, 1650-1653, 1657, 1665.

⁵ See M. Clarke, *Parliamentary Privilege in the American Colonies* 103-105, 109-111 and n. 47, 112-113 (1943); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 704-705, 707, 711-712, 716, 718, 719-722, 724-725 (1926).

II

In this case, however, there is no occasion to define or delineate precisely what process is due and must be accorded to a contemnor prior to the legislative imposition of punishment for contemptuous conduct. Here, the Wisconsin Assembly, two days after the conduct had occurred, found petitioner in contempt and sentenced him to confinement without giving him notice of any kind or opportunity to answer. There is no question of his having fled or become otherwise unavailable for, as we have noted, he was confined in the county jail at the time, and could easily have been given notice, if indeed not compelled, to appear before the Assembly. We find little in our past decisions that would shed light on the precise problem, but nothing to give warrant to the summary procedure employed here, coming as it did two days after the contempt. Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are "basic in our system of jurisprudence." *In re Oliver*, 333 U. S. 257, 273 (1948). See, e. g., *Joint Anti-Fascist Committee v. McGrath*, 341 U. S., at 143, 164-165, 171-172, 178, 185 (concurring opinions of Black, Frankfurter, DOUGLAS, and Jackson, JJ.); *Cole v. Arkansas*, 333 U. S. 196, 201 (1948). We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. E. g., *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Morgan v. United States*, 304 U. S. 1; 18 (1938); *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). In *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306 (1950), the Court stated:

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they

require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U. S., at 313.

Although this language was addressed to *judicial* adjudication, historical practice would indicate that legislatures themselves have recognized the value of prior notice and hearing in cases of legislative contempt.

In exercise of the right to be heard, however briefly—the length and nature of which would traditionally be left largely to the legislative body—the putative contemnor might establish, for example, that it was a case of mistaken identity, or, also by way of affirmative defense, that he was mentally incompetent.⁶ Other matters in explanation or mitigation might lessen the harshness of the legislative judgment or avoid punishment altogether.

III

Wisconsin, however, argues that the power of a legislature to summarily punish for contempts committed in its immediate presence follows logically from the recognized power of courts in that respect. *E. g., Ex parte Terry*, 128 U. S. 289 (1888). Even if it be assumed that courts and legislatures are fully analogous in this respect, the recorded cases dealing with the power of a court to impose summary punishment for contempt committed in its immediate presence show that such power has not ordinarily been exercised under conditions such as those here, with a lapse of two days following the event and without notice or opportunity for hearing of any kind. A legislature, like a court, must, of necessity, possess the power to act "immediately" and "instantly"

⁶ In the latter case, a legislative body, like a court, might direct a psychiatric examination. It can be assumed that one so disoriented as not to appreciate the nature of his acts would not be punished for contemptuous conduct.

to quell disorders in the chamber if it is to be able to maintain its authority and continue with the proper dispatch of its business. *In re Oliver*, 333 U. S., at 274-275; *Ex parte Terry*, 128 U. S., at 308, 310; *Johnson v. Mississippi*, 403 U. S. 212, 214 (1971); *Mayberry v. Pennsylvania*, 400 U. S. 455, 463 (1971). Where, however, the contemptuous episode has occurred two days previously, it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable a legislative body to proceed with its business.

The function of the contempt process by a legislative body is perhaps more related to deterrence of those disposed to create disorders than to restoring order. But the deterrence function can equally be served—perhaps even better—by giving notice and bringing the contemnor before the body and giving opportunity to be heard before being declared in contempt and sentenced.⁷

Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations.⁸ Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. See *Levine v. United*

⁷ Under circumstances such as those in this case, neither a court nor a legislative body has any obligation to afford a contemnor a forum to expound his political, economic, or social views; but this does not mean that some brief period to present matter specifically in defense, extenuation, or mitigation is not required.

⁸ The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge. See *Johnson v. Mississippi*, 403 U. S. 212, 214-215 (1971); *In re Oliver*, 333 U. S. 257, 275-276 (1948).

States, 362 U. S. 610, 613-614 (1960); *Brown v. United States*, 359 U. S. 41, 52 (1959); *United States v. Sacher*, 182 F. 2d 416, 418 (CA2 1950), *aff'd*, 343 U. S. 1 (1952). Even in those circumstances, as we have noted, the conduct and utterance might be found excusable by a legislature or a court should it develop that the contemnor was suffering from some mental disorder rendering him unable to conform his conduct to requirements of the law and conventional behavior. Where, however, a legislative body acts two days after the event, in the absence of the contemnor, and without notice to him, there is no assurance that the members of the legislature are acting, as a judge does in a contempt case, on the basis of personal observation and identification of the contemnor engaging in the conduct charged, nor is there any opportunity whatsoever for him to speak in defense or mitigation, if he is in fact the offender.

Ex parte Terry, *supra*, does not control this case. There the circuit court acted promptly after the contemnor—who was a lawyer—had voluntarily absented himself from the courtroom and while he was present in an adjacent room of the court building. This Court concluded that the contemnor could not defeat the jurisdiction of the circuit court to act as soon as reasonably possible to punish the contempt by his voluntary departure from the courtroom. 128 U. S., at 310-311. The Court reasoned that

“The departure of the petitioner from the courtroom to another room, near by, in the same building, was his voluntary act. And his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offence, and to make it plain that, consistently with the public interests, there should be no delay, upon the part of the court, in exerting its power to punish.” *Id.*, at 311.

Dealing only with the narrow circumstances present in *Terry*, the Court expressly reserved the question whether the circuit court would have had the power to proceed on a subsequent day without according the contemnor an opportunity to be heard. *Id.*, at 314. By way of contrast, the resolution in this case was, as we have noted, adopted two days after the event and while petitioner was being detained in the county jail in the same city, and hence available to be served with notice. In *Sacher v. United States*, 343 U. S. 1 (1952), the Court approved the trial judge's action in waiting until the end of a nine-month trial to summarily hold defense counsel⁹ in contempt for breaches committed during the trial. However, the Court was careful to observe that an immediate holding of contempt during the trial might have prejudiced the defendants in the eyes of the jury or otherwise impeded their advocacy. Moreover, the contemnors were present throughout the course of the trial, were repeatedly warned by the trial judge that their conduct was contemptuous, were advised that they could be called to account later,¹⁰ and were given an opportunity to speak.¹¹

At a very early stage in our history this Court stated that the legislative contempt power should be limited to "[t]he least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat., at 231; *In re Oliver*, 333 U. S., at 274. While a different result

⁹ One of the contemnors was a layman who had acted as his own lawyer.

¹⁰ 182 F. 2d, at 428.

¹¹ *Id.*, at 418. Although he imposed sentence before hearing the contemnors, the trial judge would, no doubt have modified his action had their statements proved persuasive. See *United States v. Galante*, 298 F. 2d 72, 76 (CA2 1962) (Friendly, J., concurring and dissenting). Modification of contempt penalties is common where the contemnor apologizes or presents matter in mitigation.

might well follow had the Wisconsin Assembly acted immediately upon occurrence of the contemptuous conduct and while the contemnor was in the chamber,¹² or nearby within the Capitol building, as in *Terry*, we conclude the procedures employed in this case were beyond the legitimate scope of that power because of the absence of notice or any opportunity to respond. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

¹² The present practice of Parliament is described in E. May, *The Law, Privileges, Proceedings and Usage of Parliament* (17th ed. 1964) as follows:

"When the contempt is committed in the actual view of either House, as, for example, where a witness prevaricates, gives false evidence or refuses to answer, the House proceeds *at once*, without hearing the offender, *unless by way of apology or to manifest his contrition*, to punish him for his contempt." *Id.*, at 133 (emphasis added).